SUPREME COURT, U.S.
FILED

021192 FEB 12 2003

OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

COOPER INDUSTRIES, INC.,
Petitioner,

v.

AVIALL SERVICES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Dale E. Stephenson
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500

Wm. Bradford Reynolds*
Lisa K. Hsiao
HOWREY, SIMON, ARNOLD & WHITE, L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

* Counsel of Record

Attorneys for Petitioner Cooper Industries, Inc.

145 P

QUESTION PRESENTED

Whether a private party who has not been the subject of an underlying civil action pursuant to CERCLA Sections 106 or 107, 42 U.S.C. §§ 9606 or 9607, may bring an action seeking contribution pursuant to CERCLA Section 113(f)(1), 42 U.S.C. § 9613(f)(1), to recover costs spent voluntarily to clean up properties contaminated by hazardous substances.

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Cooper Industries, Inc.

Aviall Services, Inc.

RULE 29.6 STATEMENT

Petitioner Cooper Industries, Inc. is a wholly-owned indirect subsidiary of Cooper Industries, Ltd.

Respondent Aviall Services, Inc. is a wholly-owned subsidiary of Aviall, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

A. The Fifth Circuit's Interpretation of Section 113(f)(1) Contradicts The Statute's Language, Its Essential Purpose, And Its Overall Structure 5

1. The Fifth Circuit Majority's Interpretation of Section 113(f)(1) Contradicts CERCLA's Statutory Language 7

2. The Fifth Circuit's Interpretation of Section 113(f)(1) Contradicts The Statute's Essential Purpose 14

3. The Fifth Circuit's Interpretation Of Section 113(f)(1) Undermines CERCLA's Overall Structure And Scheme 21

B. Both the Federal Circuits and Federal District Courts Have Expressed Differing and Conflicting Interpretations of Section 113(f)(1) 26

CONCLUSION 30

INDEX TO APPENDICES

STATUTORY PROVISIONS 1a

Aviall Services, Inc. v. Cooper Industries, Inc.,
No. 00-10197 (5th Cir. Nov. 14, 2002) (en banc opinion) 9a

Aviall Services, Inc. v. Cooper Industries, Inc.,
No. 00-10197 (5th Cir. Dec. 19, 2001)
(granting rehearing *en banc)* 46a

Aviall Services, Inc. v. Cooper Industries, Inc.,
No. 00-10197 (5th Cir. Aug. 14, 2001)
(panel opinion) 47a

Aviall Services, Inc. v. Cooper Industries, Inc.,
No. 3:97-CV-1926-D (N.D. Tex. Jan. 13, 2000)
(district court opinion) 90a

TABLE OF AUTHORITIES

CASES

Amerada Hess Corp. v. Owens-Corning Fiberglass Corp., 627 So. 2d 367 (Ala. 1993) 11

Ameritrust Co. National Association v. Lamson & Sessions Co., No. 1:92CV80087,
1992 U.S. Dist. LEXIS 22647
(N.D. Ohio May 21, 1992) 27

Amoco Oil Co. v. Borden, Inc.,
889 F.2d 664 (5th Cir. 1989) 25

Atherton v. FDIC,
519 U.S. 213 (1997) 10, 13

Aviall Services v. Cooper Industries,
312 F.3d 677 (5th Cir. 2002) ..... *passim*

Aviall Services v. Cooper Industries,
278 F.3d 416 (5th Cir. 2001) ..... *passim*

Aviall Services v. Cooper Industries,
263 F.3d 134 (5th Cir. 2001) ..... *passim*

Bedell v. Reagan,
192 A.2d 24 (Me. 1963) 11

Bedford Affiliates v. Sills,
156 F.3d 416 (2d Cir. 1998) 25, 28

Bulk Distribution Centers, Inc. v. Monsanto Co.,,
589 F. Supp. 1437 (S.D. Fla. 1984) 16

Centerior Service Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344 (6th Cir. 1998) 22, 27

Coastline Terminals, Inc. v. USX Corp., 156 F. Supp. 2d 203 (D. Conn. 2001) 27

Colorado v. Asarco, Inc., 608 F. Supp. 1484 (D. Colo. 1985) 6

Companies for Fair Allocation v. Axil Corp., 853 F. Supp. 575 (D. Conn. 1994) 27

Crandon v. United States, 494 U.S. 152 (1990) 15

Crofton Ventures L.P. v. G&H Partnership, 258 F.3d 292 (4th Cir. 2001) 9

Deby, Inc. v. Cooper Industries, 2000 WL 263985 (N.D. Ill. Feb. 29, 2000) 27

Department of Revenue v. ACF Industries, Inc., 510 U.S. 332 (1994) 13

Estes v. Scotsman Group, Inc., 16 F. Supp. 2d 983 (C.D. Ill. 1998) 27

Federal Deposit Insurance Corp. v. Bates, 42 F.3d 369 (6th Cir. 1994) 8

George's Radio, Inc. v. Capital Transit Co., 126 F.2d 219 (D.C. Cir. 1942) 11

In re Hemingway Transport, Inc., 993 F.2d 915 (1st Cir. 1993) 26

International Paper Co. v. Oullette, 479 U.S. 481 (1987) 13

Johnson County Airport Commission v. Parsonitt Co., 916 F. Supp. 1090 (D. Kan. 1996) 27

Key Tronic Corp. v. United States, 511 U.S. 809 (1994) 17, 21

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 8

Mathis v. Velsicol Chemical Corp., 786 F. Supp. 971 (N.D. Ga. 1991) 27

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) 10

Mola Development Corp. v. United States, 1985 U.S. Dist. LEXIS 22674 (C.D. Cal. Feb. 11, 1985) 6

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 13

Musick, Peeler & Garrett v. Employers Insurance, 508 U.S. 286 (1993) 18, 21

New Castle County v. Halliburton NUS Corp., 111 F.3d 116 (3d Cir. 1997) 18

New York v. Shore Realty Corp., 648 F. Supp. 255 (E.D.N.Y. 1986) 6

Ninth Avenue Remedial Group v. Allis Chalmers Corp., 974 F. Supp. 684 (N.D. Ind. 1997) 27

Northwest Airlines, Inc. v. Transport Workers Union of America., 451 U.S. 77 (1981).....6, 9, 13, 19, 20

PMC v. Sherwin Williams, Inc., 151 F.3d 610 (7th Cir. 1998)..... 28

Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982)..... 16

Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298 (9th Cir. 1997)..... 18

In re Reading Co., 115 F.3d 1111 (3d Cir. 1997).....23, 25, 28

Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489 (11th Cir. 1996)..... 17

Resolution Trust Corp. v. Gallagher, 10 F.3d 416 (7th Cir. 1993)..... 8

Rockwell International Corp. v. IU International Corp., 702 F. Supp. 1384 (N.D. Ill. 1988) 27

Royal Indemnity Co. v. Aetna Casualty & Surety Co., 229 N.W.2d 183 (Neb. 1975)..... 11

Rumpke of Indiana, Inc. v. Cummins Engine Co., 107 F.3d 1235 (7th Cir. 1997).....17, 20, 26

Skaja v. Andrews Hotel Co., 161 N.W.2d 657 (Minn. 1968)..... 11

Sun Co. v. Browning-Ferris, Inc., 124 F.3d 1187 (10th Cir. 1997).....22, 27, 29

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 6, 19

United States v. Bestfoods, 524 U.S. 51 (1998) 21

United States v. Charter International Oil Co., 83 F.3d 510 (1st Cir. 1996) 23

United States v. Compaction Systems Corp., 88 F. Supp. 2d 339 (D.N.J. 1999)..... 27

United States v. Conservation Chemical Co., 619 F. Supp. 162 (W.D. Mo. 1986)..... 6

United States v. Locke, 529 U.S. 89 (2000) 13

United States v. Medley, 1986 U.S. Dist. 23365 (D.S.C. July 1, 1986) 6

United States v. New Castle County, 642 F. Supp. 1258 (D. Del. 1986) 6

United States v. South Carolina Recycling & Disposal, Inc.,653 F. Supp. 984 (D. S.C. 1984)..... 6

United States v. Ward, 1984 U.S. Dist. LEXIS 16774 (E.D.N.C. May 11, 1984) 6

United Technologies Corp. v. Browning-Ferris Industries, 33 F.3d 96 (1st Cir. 1994).....18, 23, 24, 25, 29

Wehner v. Syntex Agribusiness, 616 F. Supp. 27 (E.D. Mo. 1985)..... 6

STATUTES

28 U.S.C. § 1254(1)..... 2

42 U.S.C. § 9606 ..... *passim*

42 U.S.C. § 9607 ..... *passim*

42 U.S.C. § 9613(f)(1) ..... *passim*

42 U.S.C. § 9613(g) 22, 28

42 U.S.C. § 9613(f)(2) 11, 23

42 U.S.C. § 9613(f)(3) 11-13, 24, 25

42 U.S.C. § 9622 22

ALASKA STAT. § 09.17.080 (2001) 10

ARIZ. REV. STAT. ANN. § 12-2501 (1994) 10

ARK. CODE ANN. § 13-50.5-102 (West 1989) 10

CAL. CIV. PROC. CODE § 875 (2001) 10

COLO. REV. STAT. § 13-21-111.5 (2001) 10

CONN. GEN. STAT. ANN. § 52-572h(h) (West 1991) 10

DEL. CODE ANN. tit. 10, § 6302 (1974) 10

FLA. STAT. ANN. § 768.31 (West 1986) 10

GA. CODE ANN. § 51-12-32 (Supp. 1994) 10

HAW. REV. STAT. § 663-12 (1985) 10

IDAHO CODE § 6-803 (1990) 10

ILL. ANN. STAT. ch. 740, ¶ 100/2 (Smith-Hurd 1993) 10

IOWA CODE ANN. § 668.5 (West 1987) 10

KAN. STAT. ANN. § 60-2413 (2001) 10

KY. REV. STAT. ANN. § 412.030 (Michie/Bobbs-Merrill 1992) 10

LA. CIV. CODE ANN. art. 1804 (West 1987) 10

MASS. GEN. LAWS ANN. ch. 231B § 1 (West 1986) 10

MD. ANN. CODE art. 50, § 17 (1994) 10

MICH. COMP. LAWS ANN. § 600.2925a (West 1986) ..10-11

MISS. CODE ANN. § 85-5-7(4) (1991) 11

MO. REV. STAT. § 537.060 (1988) 11

MONT. CODE ANN. § 27-1-703 (1993) 11

N.C. GEN. STAT. § 1B-1 (1983) 11

N.D. CENT. CODE § 32-38-01 (1976) 11

N.H. REV. STAT. ANN. § 507:7-f (Supp. 1994) 11

N.J. STAT. ANN. § 2A:53A-2 (West 1987) 11

N.M. STAT. ANN. § 41-3-2 (Michie 1978) 11

N.Y. CIV. PRAC. L. & R. 1401 (McKinney 1976) 11

NEV. REV. STAT. § 17.225 (1991) 11

OHIO REV. CODE ANN. § 2307.31 (Baldwin 1990) 11

OKLA. STAT. tit. 12, § 832 (1991) 11

OR. REV. STAT. § 18.440 (1993) 11

42 PA. CONS. STAT. ANN. § 8324 (1982) 11

R.I. GEN. LAWS § 10-6-3 (1985) 11

S.C. CODE ANN. § 15-38-20
(Law Co-op. 1977 & Supp. 1993) 11

S.D. CODIFIED LAWS ANN. § 15-8-12 (1984) 11

TENN. CODE ANN. § 29-11-102 (1980) 11

TEX. CIV. PRAC. & REM. CODE ANN. § 33.015
(Vernon Supp. 1995) 11

UTAH CODE ANN. § 78-27-40 (2001) 11

VA. CODE ANN. § 8.01-34 (Michie 1992) 11

VT. STAT. ANN. §1036 (2001) 11

W. VA. CODE § 55-7-13 (1994) 11

WASH. REV. CODE ANN. § 4.22.040 (West 1988) 11

WIS. STAT. ANN. § 885.285(3) (West Supp. 1994) 11

WYO. STAT. § 1-1-109 (2001) 11

OTHER AUTHORITIES

18 AM. JUR. 2D Contribution § 15 (1985) 20

BLACK'S LAW DICTIONARY 328 (6th ed. 1990) 19

BLACK'S LAW DICTIONARY 329 (7th ed. 1999) 19

131 Cong. Rec. 24,450 (1985) 12

H.R. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. 2835 ..... *passim*

RESTATEMENT (SECOND) OF TORTS § 886A (1979) 19, 20

RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 23 (2000) 19

S. Rep. No. 99-11 (1985), *reprinted in* 2 Legislative History of Superfund Amendments and Reauthorization Act of 1986 (1990) 7

2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION (6th ed. 2000) 8, 14

Uniform Contribution Among Tortfeasors Act § 1(d), 12 U.L.A. 194 (1996) 19

WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993) 8

In the Supreme Court of the United States

No. ____

COOPER INDUSTRIES, INC.,
Petitioner,

v.

AVIALL SERVICES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Cooper Industries, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit *en banc* is reported at 312 F.3d 677 (5th Cir. 2002), and appears in the Appendix ("App.") at 9a. The Fifth Circuit's grant of the petition for rehearing *en banc* by Aviall Services, Inc. is reported at 278 F.3d 416 (5th Cir. 2001), and appears at App. 46a. The panel opinion of the Fifth Circuit is reported at 263 F.3d 134 (5th Cir. 2001), and appears at App. 47a. The district court's opinion, No. 3:97-CV-1926-D (N.D. Tex. Jan. 13, 2000), is unreported and appears at App. 90a.

JURISDICTION

The judgment of the Fifth Circuit, sitting *en banc*, was entered on November 14, 2002. App. 9a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the pertinent provisions of 42 U.S.C. §§ 9606, 9607, and 9613 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") appears at App. 1a-8a.

STATEMENT OF THE CASE

This case presents the issue whether a private party has a right to bring suit seeking contribution pursuant to Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), even though it has not been the subject of any underlying civil action brought pursuant to 42 U.S.C. § 9606 ("Section 106") or 42 U.S.C. § 9607 ("Section 107"). The present suit was brought in 1997 by respondent Aviall Services, Inc. ("Aviall"), seeking contribution from petitioner Cooper Industries, Inc. ("Cooper") for costs Aviall incurred in connection with its voluntary clean-up of hazardous substances from four industrial facilities Aviall had purchased from Cooper in 1981. Aviall has never been subjected to any federal enforcement or litigation, nor has the federal Environmental Protection Agency ever contacted Aviall regarding the properties or designated the sites as contaminated under federal law. App. 10a. While Aviall received letters from the Texas Natural Resource Conservation Commission ("TNRCC") requesting that it take some actions at the properties, there was no state enforcement action, nor any judicially or administratively approved settlement, requiring Aviall to conduct this clean-

up. App. 10a. After allegedly spending millions of dollars to investigate and remediate the properties, Aviall filed suit against Cooper in the United States District Court for the Northern District of Texas, seeking direct cost recovery under Section 107(a), contribution pursuant to CERCLA Section 113(f)(1), and other supplemental jurisdiction claims pursuant to Texas state law. App. 10a. Aviall subsequently amended its complaint to drop the Section 107(a) direct cost-recovery claim and add state law contribution claims under two Texas environmental statutes. App. 49a.

Cooper sought summary judgment because the express language of Section 113(f)(1) allows an action for contribution only "during or following" a civil action under CERCLA Sections 106 or 107, and Aviall was not, nor had it ever been, the subject of a Section 106 or 107 civil action. The district court agreed (App. 11a),[1] and on August 14, 2001, a divided panel of the Fifth Circuit affirmed, holding that a potentially responsible party ("PRP") "seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it." App. 66a.

Aviall's petition for rehearing *en banc* was granted on December 19, 2001 (App. 46a), and a divided appeals court, sitting *en banc*, reversed. Focusing principally on Section 113(f)(1)'s "savings clause," which provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] . . . or section [107] of this title," the *en banc* majority held that this language defeated a reading of the provision's enabling clause that would restrict

---

[1] In granting summary judgment, the district court declined to exercise supplemental jurisdiction over Aviall's state law claims. App. 99a.

Section 113(f)(1) contribution to situations "during or following" a Section 106 or 107 civil action. App. 33a. The full appellate court reversed and remanded the case to the district court. App. 33a. Three judges dissented, observing that the enabling clause, not the savings clause, contains the provision's operative language, and, because Aviall failed to satisfy the enabling clause's "during or following" requirement, its instant suit for contribution under Section 113(f)(1) should be dismissed. App. 34a-45a.

Cooper thereupon timely filed the present certiorari petition seeking review by this Court.

REASONS FOR GRANTING THE WRIT

This case involves an issue of recognized importance in both the public and private sectors. Its resolution has far-reaching implications for the administration of the scheme created by Congress to facilitate clean-up of sites contaminated by hazardous substances and to impose and allocate the costs of such clean-ups among those responsible for the contamination. The courts of appeals and the district courts have expressed divergent and conflicting views as to when and under what circumstances a private party may seek contribution from other parties for clean-up costs under CERCLA.

While the Fifth Circuit here is the first federal appeals court to have ruled directly on the interplay between Section 113(f)(1)'s enabling and savings clauses, other circuits have addressed the availability of contribution under this provision of CERCLA in related circumstances, and have offered contradictory understandings of what Congress intended. The United States, which has principal responsibility for the administration and enforcement of CERCLA, submitted an

amicus curiae brief in response to a request from the *en banc* court. The decision issued by the *en banc* majority is directly contrary to the position taken by the United States. Disagreement over the scope of Section 113(f)(1) pervades the federal district courts as well. A definitive ruling from this Court is, therefore, needed to reconcile these disparate and competing views on this important issue of statutory interpretation, and thereby remove the existing confusion over when and under what circumstances the federal right of contribution in Section 113(f)(1) is available.

A. The Fifth Circuit's Interpretation of Section 113(f)(1) Contradicts The Statute's Language, Its Essential Purpose, And Its Overall Structure

The Superfund Amendments and Reauthorization Act of 1986 ("SARA") added Section 113(f)(1) to CERCLA to provide, in explicit terms, as follows:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in

> the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1).

Before the 1986 amendments, CERCLA contained no express right of contribution between or among persons responsible for, or holding an ownership interest in, contaminated facilities or property.[2] Most early lower court decisions, however, held that Section 107 embraced an implied right of contribution where the government had asserted a cost-recovery action under Section 107(a), seeking to impose joint and several liability.[3] Yet this Court's precedent in other contexts raised doubts as to whether an implied right of contribution could be judicially fashioned from federal statutes that did not expressly provide for such a right. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981); *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 91-95 (1981).

---

[2] The four categories of "covered persons" include: (1) current owners and operators of vessels or facilities where hazardous substances were disposed of; (2) past owners or operators of any such facilities; (3) persons who arranged for transport for disposal or treatment of hazardous substances; and (4) persons who accepted any such substances for transport to disposal or treatment facilities. 42 U.S.C. § 9607(a).

[3] *See, e.g., New York v. Shore Realty Corp.*, 648 F. Supp. 255 (E.D.N.Y. 1986); *United States v. New Castle County*, 642 F. Supp. 1258 (D. Del. 1986); *United States v. Ward*, 1984 U.S. Dist. LEXIS 16774 (E.D.N.C. May 11, 1984); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162 (W.D. Mo. 1986); *United States v. Medley*, 1986 U.S. Dist. LEXIS 23365 (D.S.C. July 1, 1986); *Wehner v. Syntex Agribusiness*, 616 F. Supp. 27 (E.D. Mo. 1985); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484 (D. Colo. 1985); *Mola Dev. Corp. v. United States*, 1985 U.S. Dist. LEXIS 22674 (C.D. Cal. 1985); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984).

Congress' response, through SARA, was to add Section 113(f) so as to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties. . . ." S. Rep. No. 99-11, at 44 (1985), *reprinted in* 2 Legislative History of Superfund Amendments and Reauthorization Act of 1986, at 636 (1990).

1. The Fifth Circuit Majority's Interpretation of Section 113(f)(1) Contradicts CERCLA's Statutory Language

The first sentence of Section 113(f)(1) contains its operative enabling clause, which states that any person wishing to seek contribution under that provision "may" do so "during or following any civil action under section [106] or . . . section [107(a)] . . . ." 42 U.S.C. § 9613(f)(1). According to the *en banc* majority, the word "may" is to be understood as permissive rather than mandatory, providing "a statement of non-exclusive circumstances in which actions for contribution may be brought." App. 25a. Under this interpretation, Section 113(f)(1) would not preclude private suits for contribution initiated *before* commencement of a civil action under Section 106 or Section 107 against the initiating party. *Id.* The dissent countered that, precisely because the first sentence of Section 113(f)(1) contained enabling language -- *i.e.*, creating a substantive right of contribution -- its "during or following" clause described the *only* circumstances, under traditional standards of statutory construction, in which a Section 113(f)(1) right of contribution "may" be asserted. App. 35a.

This latter understanding of Section 113(f)(1)'s enabling clause enjoys far greater authoritative support. The provision's "during or following" constraint is set forth, both

explicitly and emphatically. Under one of the most basic canons of statutory interpretation -- *expressio unius est exclusio alterius* -- such a clear expression of coverage indicates that all else was intentionally excluded. *See* 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 47:23 at 306-07; *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-68 (1993) (*expressio unius* principle bars judiciary from reading a heightened pleading requirement into federal rules). Moreover, this more restrictive view of the provision's enabling clause -- as declaring what a party may or may not do in pursuit of federal CERCLA contribution -- is fully consistent with the contemporary definition of "may." *See* WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993) (in proper context, "may" can denote exclusivity, meaning "shall [or] must. . . ."). Relevant case law also demands that the word "may," in circumstances not unlike those here, is to be understood to have preclusive effect. *See Federal Deposit Ins. Corp. v. Bates*, 42 F.3d 369, 371 (6th Cir. 1994) (statute providing that financial institution official "may" be held liable for gross negligence interpreted as providing exclusive circumstances where liability could be found); *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 420 (7th Cir. 1993) (same). The Fifth Circuit's contrary reading, while arguably finding refuge in an alternative dictionary definition assigned to the term if lifted from text and context,[4] runs directly counter to the common usage of the word "may" as generally understood in this context. *See Bates*, 42 F.3d at 371; *Gallagher*, 10 F.3d at 420.

---

[4] Webster Third New International Dictionary includes an alternative definition of the word "may" as meaning "have liberty to." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993).

The overall design of Section 113(f)(1) further reinforces this conclusion. Section 113(f)(1)'s second sentence, fairly read, indicates that Congress intended the express right of contribution in its enabling clause to describe the sole substantive right being created. That sentence commands, emphatically, that any Section 113(f)(1) contribution claim "*shall* be brought in accordance with this section" -- *i.e.*, "during or following any civil action under section [106] . . . or under section [107(a)] . . . ." -- and "*shall* be governed by Federal law." 42 U.S.C. § 9613(f)(1) (emphasis added). This last reference is to the federal common law which largely prompted passage of Section 113(f)(1), and which allowed only those joint tortfeasors who were the subjects of pending or concluded actions to seek contribution -- the very result that the "during or following" restriction included in Section 113(f)(1)'s first sentence serves to accomplish.

The provision's third sentence compels the same reading of the enabling clause. It speaks to the method of "allocat[ing] response costs" in resolving the aforesaid contribution claims, an allocation which the statute clearly provides is to be made "among liable parties." 42 U.S.C. § 9613(f)(1). The enabling clause's "during or following" requirement ensures that the private party seeking contribution is, in fact, a "liable part[y]." *Id.* It is, of course, that party's burden to show that those from whom it seeks contribution are also "liable parties." *Id.*; *see Crofton Ventures L.P. v. G&H*, 258 F.3d 292, 300 (4th Cir. 2001). Yet, the Fifth Circuit casts aside this "shared liability" principle that was, at the time of enactment, firmly embedded in the federal common law of contribution, *see Northwest Airlines*, 451 U.S. at 87, and that is embraced by the statute's operative language. *See* discussion at pp. 18-21, *infra*.

statute's savings clause thus ensured that all such other rights of action for contribution, whether state or federal, would remain unaffected and unaltered by enactment of the express right of contribution in Section 113(f)(1).

It is difficult to imagine that Congress could have intended otherwise. Having enacted Section 113(f)(1) for the express purpose of creating an explicit federal right of contribution, Congress hardly expected the new statute's language to be read as creating the very uncertainty that the amendment was enacted to eliminate.[7] The Fifth Circuit, however, has judicially constructed this very result by reading the savings clause to *expand* the contribution right expressly granted in Section 113(f)(1). Specifically, the majority below understands the statute's clear command that "[n]othing in this subsection shall diminish" other existing rights of contribution as *an intended enlargement* of the enabling clause itself. This interpretation effectively authorizes contribution actions both under Section 113(f)(1)'s savings clause, where suit could be brought by a party who has never been the subject of a Section 106 or Section 107(a) civil action, *and* under its enabling clause, where a party may seek contribution only "during or

---

proper subject for a Section 113(f)(3)(B) contribution action, notwithstanding that the "during or following" limitation in Section 113(f)(1) had not been satisfied. This is so because, under Section 113(f)(1)'s savings clause, nothing in Section 113(f)(1) is to be construed as diminishing the separate federal right of action for contribution under Section 113(f)(3)(B). Notably, Aviall asserted no right to contribution under Section 113(f)(3)(B) in this action, nor was it in a position to do so.

[7] *See* H.R. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 (Section 113(f)(1) was intended to "confirm" the decisions of those federal courts that had implied a right of contribution under CERCLA); 131 Cong. Rec. 24,450 (1985) (statement of Sen. Stafford, predicting that Section 113 would "remove[] any doubt" as to contribution right).

following" its involvement as the subject of such a civil action. App. 14a ("Section 113(f)(1) *authorizes* suits against FRPs in both its first and last sentence . . . ") (emphasis added).

Certainly, the careful wording of the enabling clause itself supports no such conclusion. Nor do the words of the savings clause, which on their own terms create nothing; they simply preserve, undiminished, whatever *other* contribution rights exist elsewhere. *Atherton*, 519 U.S. at 228. *See also United States v. Locke*, 529 U.S. 89, 105 (2000) (a savings clause creates no substantive rights of its own, operating only to preserve rights existing otherwise and elsewhere). Indeed, precisely because the savings clause was unmistakably aimed at preserving any contribution action that might be otherwise available to a private party (whether under Section 113(f)(3)(B) or under state law), to create out of the "savings" language a new and independent Section 113(f)(1) right of action for contribution that ignores the explicit restrictions of the provision's enabling clause defies every recognized principle of statutory construction. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (general savings clause will not be read to override specific provisions of statute); *Northwest Airlines*, 451 U.S. at 91-92 (right of contribution will not be implied where statute creates explicit damages action without contribution right); *Department of Revenue v. ACF Industries, Inc.*, 510 U.S. 332, 340-41 (1994) (statutes should not be read to render other provisions in the same enactment inoperative) (*citing Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)). This Court has specifically admonished that a savings clause should not be read to override or negate a statute's enabling clause. *Morales*, 504 U.S. at 384 (savings clause will not be interpreted to render specific provisions inoperative); *International Paper Co. v. Oullette*, 479 U.S. 481, 494 (1987) (declining to undermine

statute by application of general savings clause).[8] Yet, that is undeniably the effect of the Fifth Circuit's ruling here.

2. The Fifth Circuit's Interpretation of Section 113(f)(1) Contradicts The Statute's Essential Purpose

Congress passed Section 113(f)(1) to make explicit the pre-SARA implied right of contribution, as found in federal common law, by permitting parties subject to cost recovery actions under Section 106 or 107 to implead or bring separate actions against third parties potentially responsible for the contamination.[9] As expressed in the House Report accompanying the SARA amendments:

> This section clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties when the person believes that it has assumed a share of the clean-up or cost that may be greater than its equitable share under the circumstances.

H.R. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. at 2861 (emphasis added).[10]

---

[8] To the extent the Fifth Circuit seems to have found the enabling clause to be in conflict with the savings clause, principles of statutory construction dictate that the savings clause -- not the enabling clause -- would be invalidated. *See* 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 47.12 (6th ed. 2000).

[9] *See* notes 3 and 7, *supra*.

[10] While legislative history must be used cautiously in trying to discern the Congressional intent behind the language of a statute, Congress' design, object, and policy is certainly a helpful aid in determining the statute's meaning. *Crandon v. United States*, 494 U.S. 152, 158 (1990).

At the time of SARA's enactment, every case finding an implied right of contribution arose in the context of a pending or concluded suit brought by federal or state governments under Section 106 or 107. *See* note 3, *supra*. Underlying Section 107 suits were, in fact, the context for the two cases explicitly mentioned in the House Report accompanying the language that eventually became Section 113(f)(1):

> It has been held that, when joint and several liability is imposed under section 106 or 107 of the Act, a concomitant right of contribution exists under CERCLA, *United States v. Ward*, 8 Chem. & Rad. Waste Litg. Rep. 484, 487-88 (D.N.C. May 14, 1984). Other courts have recognized that a right to contribution exists without squarely addressing the issue. *See, e.g., United States v. South Carolina Recycling & Disposal, Inc.*, 7 Chem. & Rad. Waste Litig. Rep. 674, 677 (D.S.C. February 23, 1984). This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties when the person believes that it has assumed a share of the clean-up or costs that may be greater than its equitable share under the circumstances.

See H. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. at 2861.[11]

---

[11] In contrast, the cases cited by the Fifth Circuit for the proposition that other federal decisions allowed actions for recovery "in the nature of contribution" to proceed even though the plaintiff had not been sued

It is against this backdrop that the House Report describes Congress' goals for the new provision in the following terms:

> The section contemplates that *if an action under section 106 or 107 of the Act is under way*, any related claims for contribution or indemnification may be brought in such an action. This provision should also encourage private party settlements and cleanup since the actuality of being brought into litigation as a third-party defendant, concurrent with the original litigation, has the effect of bringing all such responsible parties to the bargaining table at an early date. In addition, this provision will lessen any ill will that is created between the government and the original defendants selected by the government for naming in the original suit. *This provision allows all counterclaims, cross-claims and third-party*

under § 106 or § 107, *see, e.g.*, *Bulk Distribution Ctrs., Inc. v. Monsanto Co.*,, 589 F. Supp. 1437, 1442-44 (S.D. Fla. 1984); *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1140 (E.D. Pa. 1982), do not even address "contribution." They involve, instead, covered persons who sought direct recovery of their costs -- not contribution -- from parties actually responsible for the contamination. While the Fifth Circuit pretends that "[w]hether the cases actually used the word 'contribution' is irrelevant" (App. 17a), Congress' concern was not with these direct-action decisions under Section 107(a), which were nowhere referenced in the legislative history, but rather with the separate line of cases cited in note 3, *supra*, that found an implied *right of contribution* under Section 107. See H.R. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. at 2861. The new Section 113(f)(1) made explicit this implied Section 107 right of contribution, exercisable (as with the implied right) by parties subject to, or who had been subject to, Section 106 or 107 CERCLA liability. 42 U.S.C. § 9613(f)(1).

> *actions to be dealt with in a single action if the court is so inclined.*

H. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. at 2862 (emphasis added).

The relationship between Sections 107 and 113 has been fully recognized as important to understanding the express right of contribution added to the statute in Section 113(f)(1). Indeed, this Court has observed that the two sections work together to effectuate the right of a liable party (or of one facing liability) to claim contribution from others who also contributed to the contamination. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994) (as amended by SARA, CERCLA "now expressly authorizes a cause of action for contribution in § 113" and "impliedly authorizes a similar and somewhat overlapping remedy in § 107").[12] As already indicated (*see* note11, *supra*), the new Section 113(f)(1) was but a codification of the contribution

[12] Where, for example, an "innocent" landowner *is subjected to CERCLA liability claims*, it may bring either a direct cost recovery claim against another responsible party under Section 107 seeking to impose joint and several liability, *see Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235 (7th Cir. 1997), or, alternatively, it may pursue contribution under Section 113(f)(1). This is to be distinguished from the "innocent" landowner, who, if *not subject to CERCLA liability claims*, can bring *only* a direct cost recovery action under Section 107(a), and is not in a position to pursue contribution under Section 113(f)(1). *See, e.g., Rumpke*, 107 F.3d at 1241; *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996). Aviall is not an "innocent" landowner, having contributed to the contamination of the property (App. 10a), and thus it cannot pursue a direct cost recovery action under Section 107(a). It, moreover, has never been the subject of a Section 106 or 107 civil action, and thus can assert no right of contribution under Section 113(f)(1). *And see* n.6, *supra*. Aviall's state claims for contribution under Texas law were "saved," however, under Section 113(f)(1)'s savings clause.

right that had previously been, in the case law, implied under and tied to the liability provision found in Section 107. Not even the Fifth Circuit majority disputes this interplay between the two provisions. App. 18a-19a. It simply fails to follow the connection through to its necessary conclusion. For Section 113(f)(1) to work as a "stand-alone" contribution statute, as the Fifth Circuit concludes, that provision would have to establish liability on its own -- *i.e.*, without Section 107(a). It does not do so. *See New Castle County v. Halliburton NUS Corp.*, 111 F.3d 116, 1122 (3d Cir. 1997) ("section 113 does not in itself create any new liabilities; rather, it confirms the right of a [PRP] under section 107 to obtain contribution from other [PRPs],"); *accord Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1997).

Nor can the construction of Section 113(f)(1)'s savings clause to create a stand-alone right of contribution be squared with the federal common law. Congress undeniably understood the right of contribution to be based on a common law concept of shared liability among joint tortfeasors, and it intended Section 113(f)(1) to codify that common law.[13] *See United Tech. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994); *see also* pp. 14-15, *supra*. At federal common law, one could not seek contribution unless and until that person had first discharged, by reason of judgment or settlement, the liability of other wrongdoer(s) against whom contribution is being sought. *See Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 298 (1993) (only those "charged with liability" in a common law suit for contribution under securities laws had a right to

[13] The House Report fully anticipates that "[a]s with joint and several liability issues, contribution claims will be resolved pursuant to Federal common law." H. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. at 2862.

contribution); *Texas Indus.*, 451 U.S. at 634 (characterizing contribution as helping "one tortfeasor compel others to share in the sanctions imposed by way of damages intended to compensate the victim"); *Northwest Airlines*, 451 U.S. at 87-88 (right to contribution "is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability.")

That understanding was carried forward in the Restatements. *See* RESTATEMENT (SECOND) OF TORTS, § 886A (1979); *and see* RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 23, cmt. b (2000) ("[a] person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment").[14] Only recently was the Restatement modified in conformance with Section 113(f)(1) to allow a person to sue for contribution *during* the pendency of an underlying action, as well as *after* a judgment or settlement regarding liability. *See* RESTATEMENT (THIRD) OF TORTS, § 23, cmts. b, n. (2000); *see also* Uniform Contribution Among Tortfeasors Act § 1(d), 12 U.L.A. 194 (1996).

The federal right of action that the Fifth Circuit creates from Section 113(f)(1)'s savings clause wrenches the right of contribution from its common law moorings. Persons under no obligation to make a payment based on an impending judgment or settlement, and thus heretofore

[14] *See also* BLACK'S LAW DICTIONARY 328 (6th ed. 1990); ("Under principle of 'contribution,' a tort-feasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff"); *id.* at 329 (7th ed. 1999).

unable to seek contribution, are, under the decision below, now nonetheless free to pursue contribution from others in federal court. Thus, removed from the right of contribution is what has long been regarded as one of its essential elements. *See* 18 AM. JR. 2D Contribution § 15 (1985) (one is entitled to contribution if the payment made by him was compulsory -- *i.e.*, "the party making it cannot legally resist it" -- under a legal and fixed obligation); RESTATEMENT (SECOND) OF TORTS, § 886A, cmt. e ("before there can be contribution between joint tortfeasors there must first of all be joint tortfeasors"); *see also Northwest Airlines*, 451 U.S. at 83 (two principal elements of common law right to contribution are "(1) common liability and (2) the party seeking contribution has been required to pay more than its just share of the award").

Traditionally, one who makes a voluntary payment cannot seek reimbursement from others by way of contribution, but has only a direct action for recovery of amounts owed. *See* 18 AM. JR. 2D Contribution § 15; RESTATEMENT (SECOND) OF TORTS § 886A, cmt. e (1979) (equity rule provides that contribution "will not be allowed in favor of a volunteer").[15] The reading of Section 113(f)(1) advanced below changes all that. It affords Aviall a right of contribution it did not have at federal common law.[16] To the extent Congress intended so dramatic an overhaul of the

---

[15] As previously noted, *see* note 12, *supra*, decisions following SARA continue to recognize that a landowner uninvolved in contaminating the property, who voluntarily pays clean-up costs, can bring a direct action under Section 107(a) against the responsible parties, but does not have a Section 113(f)(1) contribution suit. *See, e.g. Rumpke*, 107 F.3d at 1241.

[16] Similarly, the contribution right afforded Aviall by the Fifth Circuit's construction of Section 113(f)(1) -- as providing a free-standing right of action wholly detached from Section 107 liability – was unavailable prior to SARA even as an implied right.

federal common law, it was required to do so explicitly. Failing such explicit action, this Court has admonished strongly against judicial endorsement of rewriting federal common law by implication. *See United States v. Bestfoods*, 524 U.S. 51, 63 (1998).

Indeed, in *Bestfoods*, this Court declined to read into CERCLA Section 107 an implied liability for the parent corporation of a PRP that would depart from the common law rule against piercing of the corporate veil. As there explained: "[T]he failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that 'in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law . . . .'" *Id.* (*quoting United States v. Texas*, 507 U.S. 529, 534 (1993)). *See also Key Tronic*, 511 U.S. at 809 (rejecting implied right under CERCLA to collect attorneys' fees); *Musick, Peeler & Garrett*, 508 U.S. at 293-96 (court has only "limited" discretion to imply contribution right based on judicially-fashioned implied private right of action under securities laws). Here, too, if the federal common law of contribution is to be altered so dramatically, that task properly falls to Congress to accomplish through explicit statutory language, not to the Fifth Circuit through an overly broad construction of a "savings clause" appearing in Section 113(f)(1) of CERCLA.

3. The Fifth Circuit's Interpretation Of Section 113(f)(1) Undermines CERCLA's Overall Structure And Scheme

CERCLA's overall contribution scheme is disserved by the strained interpretation offered by the court below. For example, Congress specifically addressed the applicable

unable to seek contribution, are, under the decision below, now nonetheless free to pursue contribution from others in federal court. Thus, removed from the right of contribution is what has long been regarded as one of its essential elements. *See* 18 AM. JR. 2D Contribution § 15 (1985) (one is entitled to contribution if the payment made by him was compulsory -- *i.e.*, "the party making it cannot legally resist it" -- under a legal and fixed obligation); RESTATEMENT (SECOND) OF TORTS, § 886A, cmt. e ("before there can be contribution between joint tortfeasors there must first of all be joint tortfeasors"); *see also Northwest Airlines*, 451 U.S. at 83 (two principal elements of common law right to contribution are "(1) common liability and (2) the party seeking contribution has been required to pay more than its just share of the award").

Traditionally, one who makes a voluntary payment cannot seek reimbursement from others by way of contribution, but has only a direct action for recovery of amounts owed. *See* 18 AM. JR. 2D Contribution § 15; RESTATEMENT (SECOND) OF TORTS § 886A, cmt. e (1979) (equity rule provides that contribution "will not be allowed in favor of a volunteer").[15] The reading of Section 113(f)(1) advanced below changes all that. It affords Aviall a right of contribution it did not have at federal common law.[16] To the extent Congress intended so dramatic an overhaul of the

---

[15] As previously noted, *see* note 12, *supra*, decisions following SARA continue to recognize that a landowner uninvolved in contaminating the property, who voluntarily pays clean-up costs, can bring a direct action under Section 107(a) against the responsible parties, but does not have a Section 113(f)(1) contribution suit. *See, e.g. Rumpke*, 107 F.3d at 1241.

[16] Similarly, the contribution right afforded Aviall by the Fifth Circuit's construction of Section 113(f)(1) -- as providing a free-standing right of action wholly detached from Section 107 liability – was unavailable prior to SARA even as an implied right.

federal common law, it was required to do so explicitly. Failing such explicit action, this Court has admonished strongly against judicial- endorsement of rewriting federal common law by implication. *See United States v. Bestfoods*, 524 U.S. 51, 63 (1998).

Indeed, in *Bestfoods*, this Court declined to read into CERCLA Section 107 an implied liability for the parent corporation of a PRP that would depart from the common law rule against piercing of the corporate veil. As there explained: "[T]he failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that 'in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law . . . .'" *Id.* (*quoting United States v. Texas*, 507 U.S. 529, 534 (1993)). *See also Key Tronic*, 511 U.S. at 809 (rejecting implied right under CERCLA to collect attorneys' fees); *Musick, Peeler & Garrett*, 508 U.S. at 293-96 (court has only "limited" discretion to imply contribution right based on judicially-fashioned implied private right of action under securities laws). Here, too, if the federal common law of contribution is to be altered so dramatically, that task properly falls to Congress to accomplish through explicit statutory language, not to the Fifth Circuit through an overly broad construction of a "savings clause" appearing in Section 113(f)(1) of CERCLA.

3. The Fifth Circuit's Interpretation Of Section 113(f)(1) Undermines CERCLA's Overall Structure And Scheme

CERCLA's overall contribution scheme is disserved by the strained interpretation offered by the court below. For example, Congress specifically addressed the applicable

limitations period for pursuing a right of contribution in Section 113(g)(3). This provision establishes a period of three years *from the date of judgment or settlement* of a Section 106 or Section 107(a) action. 42 U.S.C. § 9613(g)(3).[17] In contrast, CERCLA contains no limitations period for federal contribution suits that proceed independent of such settlements or judgments. While some courts, and the *en banc* majority below (App. 30a), suggest that the six-year statute of limitations established by Section 113(g)(2) for Section 107(a) cost recovery suits can be borrowed in such circumstances,[18] *see, e.g.*, *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 355 (6th Cir. 1998); *Sun Co., Inc. v. Browning-Ferris, Inc.* 124 F.3d 1187, 1192-93 (10th Cir. 1997), this is not the limitations period prescribed by Congress for federal contribution actions, nor the one contemplated by the

---

[17] Section 113(g)(3) provides:

> No action for contribution for any response costs or damages may be commenced more than 3 years after (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(3). This language also applies to contribution suits brought under Section 113(f)(3)(B), with the three years running from the date of the triggering settlement with the government entered into pursuant to CERCLA Section 122, 42 U.S.C. § 9622.

[18] Section 113(g)(2) provides: "[a]n initial action for recovery of the costs referred to in section [107] of this title must be commenced (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action . . . ." 42 U.S.C. § 9613(g)(2)(B).

statutory scheme that Congress devised for these purposes. If the Fifth Circuit decision is allowed to stand, the discrepancy as to when a Section 113(f)(1) contribution action must commence will persist. Those suits seeking contribution under the express enabling clause will be held to a three-year statute of limitations, while those "brought" under the savings clause will presumably enjoy a more lenient six-year statute of limitations. Nothing in SARA's history or text remotely suggests that Congress intended such disparity.

Allowance of Section 113(f)(1) contribution actions in the absence of a pending or concluded civil action under Section 106 or 107 also undermines Section 113(f)'s "comprehensive scheme" to favor early settlements in Section 106 and 107 suits. *See In re Reading Co.*, 115 F.3d 1111, 1119 (3d Cir. 1997); *United States v. Charter Int'l Oil Co.*, 83 F.3d 510 (1st Cir. 1996) (describing scheme). This scheme anticipates that when the federal government, or a state brings suit against one or more PRPs under Section 106 or 107, Section 113(f)(2) protects from future contribution claims those parties who settle early.[19] *In re Reading*, 115 F.3d at 1119. PRPs who do not settle are, on the other hand, subject to potentially disproportionate liability, as they cannot seek contribution from the settling parties. *Id.*; *see also United Tech. Corp.*, 33 F.3d at 103. Section 113(f) was thus "'designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle.'" *United Tech. Corp.*, 33 F.3d at 103 (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990)); *see*

---

[19] Section 113(f)(2) provides, in pertinent part: "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide . . . ." 42 U.S.C. § 9613(f)(2).

also H.R. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. at 2862.

Yet, by allowing a private party to bring a Section 113(f)(1) contribution action in the absence of an underlying Section 106 or Section 107 civil action, the Fifth Circuit exposes defendants named in the private suit to the very real prospect of multiple and possibly inconsistent liability claims should the government (or an innocent landowner) thereafter initiate a Section 106 or Section 107 suit against any or all of them.[20] Not only does such an unbridled construction of Section 113(f)(1)'s "savings clause" seriously undermine CERCLA's objective to have clean-up costs appropriately allocated among joint tortfeasors, *see United Tech. Corp.*, 33 F.3d at 102-03, but also it takes out of play the "contribution protection" that Section 113(f)(2) was intended to afford liable parties upon settlement of a suit under the enabling clause.[21]

This is much the same reasoning that caused concern to the First and Third Circuit Courts of Appeals in determining that a party responsible for contamination cannot assert a private Section 107(a) cost-recovery action against

---

20 For example, a defendant alleged to be liable for only a portion of the clean-up costs in a contribution suit brought pursuant to Section 113(f)(1)'s savings clause, could also be alleged to be jointly and severally liable -- *i.e.*, liable for the entire clean-up costs -- in a later suit by the government. The government in the later suit could also assert that the clean-up for which contribution had been sought and obtained in the private "savings clause" action was in some respects deficient or inadequate, and pursue duplicative costs to repeat the initial work that was poorly done by another party.

21 Similarly, Section 113(f)(3)(B), which provides for a right of contribution only after settlement of an action brought by the government, *see* note 6, *supra*, is undermined by the Fifth Circuit's creation of a stand-alone right of contribution in the savings clause.

other responsible parties, but must proceed under Section 113(f)(1)'s contribution provision.[22] In *In re Reading*, 115 F.3d at 1119, the Third Circuit observed:

> [i]f a party could end run § 113(f)(2) and (3) by suing a settling party under § 107(a)(4)(B) for "costs of response," the settlement scheme would be bypassed. The incentive to early settlement would disappear, and the extent of litigation involved in a CERCLA case would increase dramatically. Consent agreements would no longer provide protection, and settling parties would have to endure additional rounds of litigation to apportion their losses.

See also United Tech. Corp., 33 F.3d at 103 (settlement-encouraging mechanism would be "gutted" by allowing private parties who contributed to the contamination to maintain Section 107(a) cost recovery actions against other potentially responsible parties prior to any government assessment of CERCLA liability). As the dissent below noted (App. 41a n.41), the Fifth Circuit's allowance of a private suit for contribution under Section 113(f)(1)'s savings clause, with no regard for the plaintiff's CERCLA liability, is equally disruptive of the statute's overall settlement scheme.

---

22 Every court of appeals considering the issue, including the Fifth Circuit, has held that parties who contribute to the property contamination (like Aviall) are prohibited from pursuing direct cost recovery claims under Section 107(a). *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2d Cir. 1998), and cases cited therein; *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672-73 (5th Cir. 1989).

B. Both the Federal Circuits and Federal District Courts Have Expressed Differing and Conflicting Interpretations of Section 113(f)(1)

While the Fifth Circuit is alone in directly holding that the savings clause in Section 113(f)(1) overrides the provision's enabling clause, its understanding of the federal right of contribution created by Section 113(f)(1) squarely conflicts with the Seventh Circuit's understanding of the statute. In *Rumpke*, 107 F.3d at 1241, the Seventh Circuit considered, on the one hand, the availability of a Section 113(f)(1) contribution action to a party uninvolved in polluting the contaminated property, and, on the other hand, the extent to which those who did pollute were insulated under Section 113(f)(2), 42 U.S.C. § 9613(f)(2), from third-party claims of contribution by virtue of having reached an earlier clean-up settlement with the government. While concluding that a Section 113(f)(1) contribution action was available only to those who themselves contributed to the contamination, and against those polluters who had not yet entered into a federal or state clean-up settlement as to the specific property in question, the Seventh Circuit observed, directly contrary to the Fifth Circuit, that "a § 106 or a § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available. This appears to be what the statute requires . . . ." *Rumpke*, 107 F.3d at 1241.

The First Circuit has also expressed a view of the statute seemingly contrary to that of the Fifth Circuit, holding in *Hemingway Transport, Inc.*, 993 F.2d 915, 931 (1st Cir. 1993), that the savings clause in Section 113(f)(1) merely "saved" what was otherwise available -- namely, an implied right under Section 107 for a plaintiff who had incurred clean-up costs pursuant to a Section 106 EPA administrative order -- but did not expand the right of contribution beyond

what was found in the enabling clause. Both the Sixth and Tenth Circuits, on the other hand, have allowed Section 113(f)(1) contribution actions in circumstances like those in the First Circuit (where parties were acting in response to a Section 106 EPA administrative order and no Section 106 or 107 civil action had been commenced or concluded), by permitting a "free standing" federal right of contribution, as did the Fifth Circuit here. *Compare Centerior Serv.*, 153 F.3d at 352 (6th Cir.) *with Sun Co.*, 124 F.3d at 1192-93 (10th Cir.).

When and under what circumstances Section 113(f)(1) permits the filing of an action for federal contribution has sharply divided the federal district courts as well. Some have read Section 113(f)(1)'s saving clause as independently creating a right of contribution in the absence of a Section 106 or Section 107 civil action, applying reasoning similar to the *en banc* majority below. *See Coastline Terminals, Inc. v. USX Corp.*, 156 F. Supp. 2d 203 (D. Conn. 2001); *Ninth Ave. Remedial Group v. Allis Chalmers Corp.*, 974 F. Supp. 684 (N.D. Ind. 1997); *Johnson County. Airport Comm'n v. Parsonitt Co.* 916 F. Supp. 1090 (D. Kan. 1996); *Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575 (D. Conn. 1994); *Mathis v. Velsicol Chem. Corp.*, 786 F. Supp. 971 (N.D. Ga. 1991). Others have read Section 113(f)(1) as creating only a limited right of contribution, as did the Seventh Circuit, finding the language in the provision's enabling clause to be controlling. *See Deby, Inc. v. Cooper Indus.*, 2000 WL 263985 (N.D. Ill. Feb. 29, 2000); *United States v. Compaction Sys. Corp.*, 88 F. Supp. 2d 339 (D.N.J. 1999); *Estes v. Scotsman Group, Inc.*, 16 F. Supp. 2d 983 (C.D. Ill. 1998); *Ameritrust Co. Nat'l Ass'n v. Lamson & Sessions Co.*, No. 1:92CV80087, 1992 U.S. Dist. LEXIS 22647, at *10 (N.D. Ohio May 21, 1992); *Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384 (N.D. Ill. 1988). Accordingly, there is a need for this Court

to grant certiorari to resolve the clear disagreement in the lower federal courts over the proper interpretation of CERCLA's Section 113(f)(1).

How this issue is ultimately decided will determine the extent to which CERCLA's federal right of contribution effects a broad preemption of state contribution rights, as suggested by the Fifth Circuit's decision, or more narrowly preempts state rights of contribution, as expressed by the Seventh Circuit. Under the approach taken by the Fifth Circuit, an expansive application of the savings clause in Section 113(f)(1) will necessarily occupy the field, preempting the very state law contribution claims that the clause was intended to save. By contrast, a reading of Section 113(f)(1) that limits the federal right of contribution to suits brought "during or following" Section 106 or Section 107 civil actions would, as the Seventh Circuit has recognized, preempt only those state rights of contribution in direct conflict with that federal right, but would not otherwise interfere with a party's right to pursue contribution under state law. *See PMC v. Sherwin Williams, Co.*, 151 F.3d 610, 617-18 (7th Cir. 1998) (Section 113(f)(1) preempted Illinois contribution statute insofar as the state statute would have nullified CERCLA's requirement of consistency with the National Contingency Plan). Similar decisions have been issued by the Second and Third Circuits. *Bedford Affiliates v. Sills*, 156 F.3d 416, 425-27 (2d Cir. 1998) (Section 113(f) preemption is limited to those common law restitution and indemnification actions that would allow bypass of CERCLA's scheme favoring settlements); *In re Reading*, 115 F.3d at 1119-20 (same).

The current confusion in the federal circuits as to whether to apply a three-year (42 U.S.C. § 9613(g)(3)) or six-year (42 U.S.C. § 9613(g)(2)) statute of limitations to the federal right of contribution also argues for this Court to

grant the petition to decide the issue presented. *Compare United Tech. Corp.*, 33 F.3d at 103 (three years) *with Sun Co*, 124 F.3d at 1192 (six years). *See also* pp. 21-23, *supra*.

The decision below wrongly decides an issue of statutory construction in a manner that greatly expands the right of contribution available under Section 113(f)(1) of CERCLA beyond the statute's clear language and intended purpose. It is diametrically opposed to the United States' interpretation of this important federal statute, which the Fifth Circuit solicited and then wholly disregarded. The Seventh Circuit reads Section 113(f)(1) as does the statute's principal enforcer – a reading which the First Circuit appears to share, but perhaps not the Sixth and Tenth Circuits. Other lower federal courts are irreconcilably split on the issue. Resolution by this Court is thus needed to definitively decide when and under what circumstances the federal right of contribution is available under CERCLA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Dale E. Stephenson
SQUIRE, SANDERS &
DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500

Wm. Bradford Reynolds
Lisa K. Hsiao
HOWREY, SIMON, ARNOLD
& WHITE, L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Petitioner
Cooper Industries, Inc.

FEBRUARY 2003

APPENDIX

STATUTORY PROVISIONS

42 U.S.C. § 9606. ABATEMENT ACTIONS

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

* * *

42 U.S.C. § 9607. LIABILITY

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date.

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses.

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by —

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement

arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

* * *

42 U.S.C. § 9613. CIVIL PROCEEDINGS

* * *

(f) Contribution.

(1) Contribution. Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement. A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement.

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the

State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred tc in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought.

(1) Actions for natural resource damages. Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and

maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before Oct. 17, 1986.

(2) Actions for recovery of costs. An initial action for recovery of the costs referred to in section 9607of this title must be commenced —

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section

9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution. No action for contribution for any response costs or damages may be commenced more than 3 years after —

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

* * *

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10197

AVIALL SERVICES, INC.,

Plaintiff-Counterdefendant-Appellant,

versus

COOPER INDUSTRIES, INC.,

Defendant-Counterclaimant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

November 14, 2002

Before KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, and DENNIS, Circuit Judges.[1]

EDITH H. JONES, Circuit Judge:

The question presented in this case is whether § 113(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") allows a

---

[1] Judge Clement is recused and did not participate in the decision. Judge Parker retired before the case was decided.

"potentially responsible party (PRP) to seek contribution from other PRPs for environmental cleanup costs when no civil action has been brought under CERCLA §§ 106 or 107(a)." *See* 42 U.S.C. §§ 9606, 9607(a), 9613(f)(1) (2000) (hereinafter, citations are to sections of CERCLA). We hold, contrary to the panel majority whose opinion generated this en banc proceeding, that it does.

BACKGROUND

Appellant Aviall Services, Inc., purchased from appellee Cooper Industries, Inc. property in Dallas, Texas, that was contaminated with various hazardous substances. After prodding from the Texas Natural Resource Conservation Commission (TNRCC), Aviall began cleaning up the property.[2] The federal Environmental Protection Agency (EPA) never contacted Aviall or designated the property as contaminated. To recover some of the millions of dollars it had incurred in cleanup expenses, Aviall sued Cooper in the district court seeking contribution under CERCLA and damages under state law theories. Cooper filed counterclaims. Both Cooper and Aviall concede that they are PRPs under CERCLA because they contributed to the contamination of the property. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 137 (5th Cir. 2001).

---

2 The TNRCC sent letters instructing Aviall to undertake various investigation and remediation activities. The first such letter, styled a "Corrective Action Directive," contained a detailed list of required activities. Two later letters cited alleged violations of regulations and statutory provisions and indicated that enforcement action would be sought "[i]f you fail to adequately respond." A fourth letter promised enforcement action if Aviall failed to pursue one of two suggested remediation options.

Holding that Aviall could not yet assert a claim for contribution under CERCLA because it had not been subjected to an action under §§ 106 or 107(a), the district court granted summary judgment for Cooper on Aviall's CERCLA claim, dismissed it without prejudice, and declined to exercise supplemental jurisdiction over the parties' state law claims. Aviall appealed.

A divided panel of this court affirmed, holding that "a PRP seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it." *Aviall Servs., Inc.*, 263 F.3d at 145. For this conclusion, the panel majority relied primarily on its textual interpretation of § 113(f)(1) of CERCLA, which provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1) (2000). The panel read the first sentence of § 113(f)(1) to "require[] a PRP seeking contribution from other PRPs to have filed a § 113(f)(1)

claim 'during or following' a federal CERCLA action against it." *Aviall Servs., Inc.*, 263 F.3d at 138. The term "contribution" was understood to "require[] a tortfeasor to first face judgment before it can seek contribution from other parties," *id.*, and the term "may" in the first sentence of § 113(f)(1) was viewed by the majority as creating "an exclusive cause of action and mean[ing] 'shall' or 'must.'" *Id.* at 138-39. *Compare Resolution Trust Corp. v. Miramon*, 22 F.3d 1357 (5th Cir. 1994). As for the final sentence of § 113(f)(1) — sometimes referred to as the "savings clause" — the panel read this "to mean that the statute does not affect a party's ability to bring contribution actions based on *state* law." *Id.* at 139. (Emphasis in original). The panel majority believed that interpreting the savings clause "to allow contribution suits, regardless of whether the parties are CERCLA defendants in a § 106 or § 107(a) action," would "render superfluous the first sentence of § 113(f)(1), the enabling clause," *id.*, and thus, would violate the canon of statutory construction that a specific provision governs over a general provision. *Id.* at 140.

Judge Wiener dissented, furnishing the alternative interpretation of § 113(f)(1) that we adopt here and pointing out that the great majority of circuit courts implicitly reject the panel majority's conclusion.

Because of the importance of this question to the allocation of financial responsibility for CERCLA cleanups, we granted Aviall's petition for en banc rehearing.

DISCUSSION

Statutory construction begins with the plain language of a statute, but "plain" does not always mean "indisputable" or "pellucid." Consequently, sound interpretation reconciles the text of a disputed provision with the structure of the law

of which it is a part; may draw strength from the history of enactment of the provision; and acknowledges the legislature's general policies so that the interpretation does not become absurd.[3]

Reasonable minds can differ over the interpretation of section 113(f)(1), because its syntax is confused, its grammar inexact and its relationship to other CERCLA provisions ambiguous. Using the above tools, however, we adopt what we consider the most reasonable interpretation of the provision. To facilitate the discussion, we first state the preferred interpretation and compare it briefly with the interpretation advocated by the panel majority. Prefatory to defending our interpretation, a review of the statutory and decisional background leading to the passage of § 113(f) will be helpful.

The en banc majority concludes that section 113(f)(1) does not constrain a PRP for covered pollutant discharges from suing other PRPs for contribution only "during or following" litigation commenced under sections 106 or 107(a) of CERCLA. Instead, a PRP may sue at any time for

---

3 *Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 1001, 108 L. Ed. 2d 132 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433, 440 (5th Cir. 2000) (stating that use of legislative history is appropriate where statutory text is "opaque," "translucent," or "ambiguous"), *cert. denied*, 532 U.S. 971 (2001); *United States v. A Female Juvenile*, 103 F.3d 14, 16-17 (5th Cir. 1996) ("Axiomatic in statutory interpretation is the principle that laws should be construed to avoid an absurd or unreasonable result."); *In re Timbers of Inwood Forest Assocs., Ltd.*, 793 F.2d 1380, 1384 (5th Cir. 1986) ("Each part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole. Thus it is not proper to confine interpretation to the one section to be construed.").

contribution under federal law to recover costs it has incurred in remediating a CERCLA site. Section 113(f)(1) authorizes suits against PRPs in both its first and last sentence which states without qualification that "nothing" in the section shall "diminish" any person's right to bring a contribution action in the absence of a section 106 or section 107(a) action.

The dissent's narrow textual interpretation is flawed for several reasons.[4] Regarding the first sentence, it focuses unduly on the phrase "during or following," and it implicitly interprets "civil action" to include administrative remedial orders only when the government files suit to enforce them in federal court. It narrows the last sentence arbitrarily and without textual support to the preservation of state law contribution claims. Finally, the dissent's interpretation distorts the interplay of the first and last sentences and fails to make sense against the background of caselaw and other interpretive guideposts.

I. BACKGROUND — WHY SECTION 113(F) WAS NEEDED

CERCLA was enacted in 1980 to establish a means of controlling and financing governmental and private cleanups of hazardous releases at abandoned and inactive waste disposal sites. CERCLA's twin purposes are to promote prompt and effective cleanup of hazardous waste sites and the sharing of financial responsibility among the parties whose actions created the hazards. *See, e.g., OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997); *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (en banc), *cert. denied*, 122 S. Ct. 1437 (2002). Under the statute, the EPA

4 The dissent modifies the panel majority's interpretation somewhat. This opinion responds only to the dissent.

possesses broad powers to remediate sites itself and require "covered persons" (PRPs) to reimburse the government's costs, and to compel PRPs to perform the cleanups by administrative order or court action. 42 U.S.C. §§ 9604, 9606(a) (2000). The definition of "covered persons" encompasses nearly all those who have or had contact with a particular site.[5] Further, every PRP is jointly and severally liable unless it can prove the specific amount of harm it caused. *See generally Bell Petroleum Servs. v. Sequa Corp.*, 3 F.3d 889, 894-902 (5th Cir. 1993) (applying principles of apportionment found in *Restatement (Second) of Torts* to CERCLA liability). These circumstances, together with the enormous costs of remediating hazardous waste sites, make the availability of contribution among PRPs all the more important for achieving the purposes of the statute — that those responsible for environmental damage to sites, not other parties, properly bear the costs of their actions, and that the sites are actually cleaned up.

As enacted, however, CERCLA contained no explicit provision allowing recovery through contribution. Federal courts soon began articulating a federal common law right of contribution to resolve claims among PRPs. The seminal decision is *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982), in which the City of Philadelphia sued another PRP for cleanup costs. Neither the

5 The four classes of "covered persons" include (1) current owners and operators of vessels or facilities where hazardous substances were disposed of; (2) past owners or operators of any such facilities; (3) persons who arranged for transport for disposal or treatment of hazardous substances; and (4) persons who accepted any such substances for transport to disposal or treatment facilities. 42 U.S.C. § 9607(a) (2000), 42 U.S.C. § 9607(a) (2000). While three defenses are enumerated in the statute, they are not routinely available to PRPs. *See* Susan M. Cooke and Christopher P. Davis, *The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation* § 13.01[5][c], at 13-70.17.

federal nor state governments had brought suit against the city under CERCLA, *id.* at 1143, and there is no indication in the opinion that the city had been sued or been the object of a CERCLA administrative cleanup order. The district court rejected the defendants' argument that because the city was subject to liability under the statute, it could not recover its cleanup costs from other responsible parties. *Id.* at 1141-42. *See also NL Indus., Inc. v. Kaplan*, 792 F.2d 896 (9th Cir. 1986) (what amounted to a CERCLA action for contribution allowed to proceed in absence of lawsuit or federal administrative action against the contribution plaintiff under sections 106 or 107); *Pinole Point Prop., Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283 (N.D. Cal. 1984) (plaintiff, itself a PRP, could seek recovery under CERCLA § 107(a)(4)(B) for its response costs where no governmental action had been taken).[6]

Several other published federal decisions allowed CERCLA actions for recovery in the nature of contribution to proceed even though the plaintiff had not been sued under § 106 or § 107.[7] In particular, this court held that prior

---

6 *See Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916 (N.D. Okla. 1987) (relying on *Stepan Chem. Co.* in concluding "that under 42 U.S.C. § 9607(a)(4)(B), a private party, even though a responsible party under CERCLA, who voluntarily pays CERCLA response costs may bring an action in its own behalf to collect cleanup costs against the parties allegedly responsible for the production and dumping of hazardous wastes").

7 *See, e.g., Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 889 (9th Cir. 1986) (state agencies required site owner to test waste substances; owner sued prior owner for costs incurred; action allowed to proceed; appeal decided on same day as *NL Indus., Inc.*); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074 (1st Cir. 1986); *City of New York v. Exxon Corp.*, 633 F. Supp. 609, 612-13, 615-18 (S.D.N.Y. 1986) (city, which owned and operated landfills, sued corporations that generated and transported wastes dumped at landfills; court denied motions to dismiss city's § 107 claims). *Cf. Cadillac*

government involvement was not a prerequisite to recoupment of § 107 response costs by one group of PRPs against other PRPs. *Tanglewood E. Homeowners Ass'n v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1575 (5th Cir. 1988). Whether the cases actually used the label "contribution" is irrelevant, as an action brought by a PRP for response costs against another PRP is inherently one for contribution.[8] And even if the first PRP recovers 100% of its costs from the second PRP, that does not makes its recovery any less a recovery in contribution.[9]

Fairview/California, Inc. v. Dow Chem. Co., 299 F.3d 1019, 1024 (9th Cir. 2002) (owner sued other PRPs in 1983 for damages to cover expenses of investigating soil pollution; no indication in opinion that owner was sued beforehand; prior opinion in case, rejecting argument that prior governmental action was required for owner's suit to proceed, states that testing activities were undertaken at request of state officials, 840 F.2d 691, 692-93 (9th Cir. 1988)); *Allied Towing Corp. v. Great E. Petroleum Corp.*, 642 F. Supp. 1339, 1347-1350, 1352 (E.D. Va. 1986) (plaintiff transporter of hazardous substance sued defendants for remedial costs arising from loading of substance onto plaintiff's barge; although concluding that complaint stated claim for cost recovery under CERCLA § 107, court granted at least two defendants' motion to dismiss § 107 claim on other grounds; unclear whether court dismissed claim as to other defendants).

8 *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2nd [sic] Cir. 1998); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995) ("There is no disagreement that both parties are PRPs by virtue of their past or present ownership of the site; therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution."); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

9 *Cadillac Fairview/California, Inc.*, 299 F.3d at 1026 (no abuse of discretion for trial court to allocate 100% of contribution liability to defendant United States); *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 549 (6th Cir. 2001) (no abuse of discretion for trial court to allocate total contribution liability to defendant); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 615-16

The Supreme Court expressly acknowledged this development of federal common law when it held that § 107 of CERCLA "impliedly authorizes" a cause of action for contribution. *Key Tronic Corp. v. United States*, 511 U.S. 809, 816, 114 S. Ct. 1960, 1965-66 (1994) (citing *Stepan Chemical* and others of the foregoing cases). Ironically, the Court was in part responsible for Congress's enactment of an express statutory provision for contribution among PRPs. Decisions it rendered in the early 1980s, which were cited in the legislative history concerning § 113(f), had cast doubt on the ability of federal courts to fashion implied rights of contribution under federal statutes. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40, 101 S. Ct. 2061, 2066-67 (1981); *Northwest Airlines, Inc. v. Transp. Workers Union of Amer.*, 451 U.S. 77, 91-95, 101 S. Ct. 1571, 1580-83, 67 L.Ed.2d 750 (1981).

Congress passed § 113(f) against this statutory and decisional background. First, a way had to be found to encourage cost-sharing among PRPs. Second, lower federal courts were implementing, albeit unevenly, contribution rights that did not depend on pre-existing EPA administrative orders and that did not arise solely "during or following" CERCLA enforcement actions. Third, the Supreme Court had cast doubt on the availability *vel non* of federal common law contribution claims, arguably including those under CERCLA. Section 113(f) was born as the "machinery" to govern and regulate actions for contribution, "providing the details and explicit recognition that were missing from the

---

(7th Cir. 1998) (100% contribution award to plaintiff not an abuse of discretion even though plaintiff engaged in some dumping). *But cf. Bedford Affiliates*, 156 F.3d at 424 ("one potentially responsible person can never recover 100 percent of the response costs from others similarly situated since it is a joint tortfeasor — and not an innocent party — that ultimately must bear its pro rata share of cleanup costs under § 107(a)").

text of § 107." *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1997).[10] Section 113(f) was enacted as part of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

We conclude this section with a brief and cautious review of the legislative history of § 113(f). Legislative history should be consulted gingerly, if at all, in aid of statutory construction. *Boureslan v. ARAMCO*, 857 F.2d 1014, 1018 (5th Cir. 1988), *adopted en banc* **[sic]** 892 F.2d 1271 (5th Cir. 1990), *aff'd. sub nom. E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). Caution is even more necessary here, for CERCLA is notorious for vaguely drafted provisions and an inconclusive, if not contradictory, legislative history. *Bell Petroleum Servs.*, 3 F.3d at 901 n.13 (quoting *Amoco, Inc. v. Borden*, 889 F.2d 664, 667 (5th Cir. 1989)). Only a few general observations can be drawn from the available legislative history materials.

First, the avowed purpose of § 113(f)(1) was to give PRPs the "explicit right to sue" for contribution and to "confirm" the decisions of federal courts that had so construed CERCLA. *See, e.g.*, H.R. Rep. No. 99-253, pt. I, at 59, 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841, 2861; S. Rep. No. 99-11, at 44 (1985).[11] *See also* 131 Cong.

---

10 *See also Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997) (a § 113(f) contribution action "*is* an action for recovery of *the costs* referred to in § 107"); *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 924 (5th Cir. 2000) (same), *cert. denied*, 533 U.S. 950 (2001).

11 Both of these reports refer to earlier versions of § 113(f)(1) that differ from the enacted version in a number of respects, particularly in their keying of contribution to entry of a judgment, S. Rep. No. 99-11, at 90, or a "defendant alleged or held to be liable." [**"?**] H. R. Rep. No. 99-253, pt. III, at 18 (1995), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3041.

Rec. 24,450 (1985) (statement of Sen. Stafford (predicting that § 9613 would "remove[] any doubt as to the right of contribution")). *Cf.* William D. Araiza, *Text, Purpose and Facts: The Relationship Between CERCLA Sections 107 and 113*, 72 Notre Dame L. Rev. 193, 224-26 (1996).

Second, Congress emphasized in SARA that it had previously encouraged the federal courts to devise equitable solutions for apportioning waste site cleanup costs among numerous PRPs:

> No change has been made in the standard of liability that applies under CERCLA. . . . [L]iability under CERCLA is strict, that is, without regard to fault or willfulness. Where appropriate, liability under CERCLA is also joint and several, as a matter of federal common law.
>
> Explicit mention of joint and several liability was deleted from CERCLA in 1980 to allow courts to establish the scope of liability through a case-by-case application of "traditional and evolving principles of common law" and pre-existing statutory law. *The courts have made substantial progress in doing so.* The Committee fully subscribes to the reasoning of the court in the seminal case of *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), which established a uniform federal rule allowing for joint and several liability in appropriate CERCLA cases.

Like the enacted version, both of the earlier versions contained "savings clauses.

H.R. Rep. No. 99-253, pt. I, at 74 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856 (citations omitted) (emphasis added).[12] Another federal district court decision cited favorably in the legislative history expressly extends this common law process of development to contribution actions. *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984, 995 n.8 (D.S.C. 1984), *aff'd in part, vacated in part on other grounds sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cited in* House Report No. 99-253, pt. I, at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861, *and cited in* S. Rep. No. 99-11, at 44 (1985).[13]

Third, although snippets of the legislative history suggest that Congress intended to remove any doubt that the right of contribution was available *after* the person seeking contribution had been sued under section 106 or 107,[14] these

---

12 The *Chem-Dyne* decision, expressly referring to contribution in its discussion, concluded that Congress intentionally omitted the term "joint and several liability" so as "to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases." 572 F. Supp. at 807 n.3 and 808. "The deletion was not intended as a rejection of joint and several liability. Rather, the term was omitted in order to have the scope of liability determined under common law principles . . . ." *Id.*

13 *See* H.R. Rep. No. 99-253, pt. I, at 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862 ("As with joint and several liability issues, contribution claims will be resolved pursuant to Federal common law. Although the only defenses to liability remain those set forth in section 107(b), courts are to resolve such claims on a case-by-case basis, taking into account relevant equitable considerations.").

14 S. Rep. No. 99-11, at 44 (1985) ("This amendment clarifies and confirms the right of a person *held jointly and severally liable* under CERCLA to seek contribution from other potentially liable parties . . .") (emphasis added); H.R. Rep. No. 99-253, pt. I, at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 ("The section also confirms a Federal

statements are contradicted by others and, as noted, pertain to much different versions of § 113(f) that were not ultimately adopted. *See Aviall Servs., Inc.*, 263 F.3d at 151 (Wiener, J., dissenting).

The mixed and shifting signals from legislative history yield no guide that should color the textual interpretation of § 113(f)(1). Yet, it would seem odd that a legislature concerned with clarifying the right to contribution among PRPs and with facilitating the courts' development of federal common law apportionment principles would have rather arbitrarily cut back the then-prevailing standard of contribution. In no event does the history "overwhelmingly support" the panel majority's narrow view of the statute. *Id.* at 140.

For sixteen years, Sections 113(f) and 107 have governed the availability of contribution actions under

---

right of contribution or indemnification for persons *alleged or held to be liable* under section 106 or 107 of CERCLA . . . . This section clarifies and confirms the right of a *person held jointly and seve[]rally liable* under CERCLA to seek contribution from other potentially liable parties . . . .") (emphasis added); H.R. Rep. No. 99-253, pt. III, at 18 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3041, *quoted in* n.10, *supra*; H.R. Rep. No. 99-253, pt. V, at 24 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3147 ("New subsection (g) expressly recognizes the right to contribution. Any defendant alleged or held to be liable in an action under section 106 or 107 may bring an action for contribution or indemnity against any other person liable or potentially liable."). *But cf.* H.R. Rep. No. 99-253, pt. I, at 59 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841 ("The bill would give potentially responsible parties the explicit right to sue other liable or potentially liable parties who also may be responsible for the hazardous waste site."); *id.* at 266, *reprinted in* 1986 U.S.C.C.A.N. at 2940 (separate and dissenting views of Members of Congress) ("The section would also establish a federal right of contribution or indemnity for persons *liable* under section 106 or § 107 of current law . . . .") (emphasis added).

CERCLA. As the Supreme Court explained it, CERCLA, as amended by SARA, authorizes two kinds of contribution actions among PRPs, one that is explicit under § 113(f) and another that is an "implied," "similar and somewhat overlapping" action pursuant to § 107. *Key Tronic Corp.*, 511 U.S. at 816, 114 S. Ct. at 1965-66.[15] To the statute we turn.

II. STATUTORY TEXT

This court's expansive reading of § 113(f)(1) — which enables a claim by a PRP "at whatever time in the cleanup process the party, seeking contribution, decides to pursue it"[16] — suits its text better than the restrictive reading adopted by the dissent.

---

15 The parties dispute whether Aviall's pleadings seek contribution under the § 107 implied action as well as under § 113(f)(1). It is unnecessary to reach this question or to opine more concretely on the theoretical problems surrounding this "overlap" of remedies. *See OHM Remediation Servs.*, 116 F.3d at 1571 (SARA amendments "codified the federal common law rights of contribution"); *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994) ("Congress, in enacting SARA, sought to codify the case law" holding that § 107 conferred implied right of action among PRPs for contribution); *but see In re Reading Co.*, 115 F.3d 1111, 1117-21 (3d Cir. 1997) (holding that § 113(f) is the exclusive statutory vehicle for contribution claims and specifically rejecting "dictum" in *Key Tronic* about "overlapping" contribution actions, 511 U.S. at 816, 114 S. Ct. at 1966).

16 *See In re Reading Co.*, 115 F.3d at 1120: "Indeed, the fact that § 113(f)(1) specifically permits an action for contribution to be brought 'in the absence of a civil action under . . . section [107]' reenforces our conclusion that Congress intended § 113 to be the sole means for seeking contribution – at whatever time in the cleanup process the party, seeking contribution, decides to pursue it." We subscribe to the portion of the court's statement quoted above in the text, but have doubts about its exclusivity contention. *See* n.13, *supra*.

The first point of disagreement between the dissent and the en banc majority is over the exclusivity of the claim for contribution described in the first sentence of § 113(f)(1). Does its allowance of contribution actions "during or following" a § 106 or § 107(a) civil action mean that contribution actions are "only" allowed in such circumstances? We think not. The dissent's interpretation of the first sentence of § 113(f) departs from "plain meaning" in several ways. "Only," for instance, is the word choice of the dissent, not of Congress, which characterized the actions permissively (a PRP "may" bring an action for contribution). Elsewhere in CERCLA, Congress used "only" many times, signifying its intent to narrow, exclude or define provisions.[17] Had Congress similarly intended to make contribution actions available "only" after the referenced CERCLA lawsuits have been brought, it could have done so.

After adding "only" to the first sentence of § 113(f)(1), the panel revised "may" to mean "shall," and thus rendered contribution claims available exclusively during or following certain CERCLA civil actions. The dissent then

---

17 *See, e.g.*, 42 U.S.C. § 9607(a) (2000) ("Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section . . ."); 42 U.S.C. § 9613(a) (2000) ("Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia."); 42 U.S.C. § 9613(j)(3) (2000) ("If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national Contingency Plan, . . ."); 42 U.S.C. § 9624(b) (2000) ("In the case of any release or threatened release referred to in paragraph (1), the owner or operator of the equipment described in subsection (a) of this section shall be liable under this chapter only for costs or damages primarily caused by the activities of such owner or operator."). (Emphasis added).

implicitly defines "civil action" to include a federal administrative enforcement proceeding but only when the administrative order is contested or enforced in federal court. No one doubts the importance of permitting contribution claims when administrative enforcement actions are underway. Other courts have authorized such claims.[18] But the dissent has effectively limited the availability of such actions by requiring prior initiation of a lawsuit by the federal government. This interpretation would be unnecessary if the dissent had accorded the properly broad scope to the last sentence of § 113(f)(1) and considered the first sentence, as we do, to be a statement of non-exclusive circumstances in which actions for contribution may be brought.[19]

The final point of contention concerns the inter-relationship of the first and last sentences of § 113(f)(1). Despite the unusual syntax of this subsection, the en banc court finds these sentences logically complementary, if somewhat unusual in this regard. Thus, in addition to affording a particular right of contribution in the first sentence, the provision emphasizes in its last sentence that "nothing" shall "diminish" any other contribution right available to the parties. This so-called "savings provision" takes on added meaning in light of the pre-SARA caselaw, which did not restrict common law contribution actions until during or after proceedings or civil actions against the party

---

18 *See, e.g., Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998) (allowing CERCLA action for contribution to proceed after issuance of federal administrative order but prior to initiation of suit by any party under section 106 or 107); *Sun Co.*, 124 F.3d at 1189 (same).

19 The dissent now concedes, contrary to the panel majority, that a § 113(f)(1) contribution action may be brought before a judgment is entered, but given their restrictive reading of the provision, that is not much of a concession.

who had incurred disproportionate remediation and response costs.

The dissent, however, is driven to a narrow view of the "savings provision" for fear that any different reading would vitiate the effect of the first sentence of § 113(f)(1).[20] The dissent reads the "savings provision" to refer to actions for contribution under *state* law, implicitly rejecting among other things a construction that would preserve contribution actions arising by federal common law under § 107. Taken together with its exclusive view of the first sentence of § 113(f)(1), the panel's interpretation is at least in tension with the Supreme Court's description of CERCLA contribution:

> Thus the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.

Key Tronic Corp., 511 U.S. at 816, 114 S. Ct. at 1965-66. It is not clear that the dissent's holding permits an implied § 107 contribution right to coexist.

This is not a situation in which the text of the savings clause robs the first sentence of § 113(f)(1) of its meaning, as the dissent contends. Instead, the provision was enacted as confirmation that federal courts, in cases decided prior to SARA's enactment, had been right to enable PRPs to recover a proportionate share of their costs in actions for contribution against other PRPs. Confirmation of this sort was needed to

---

20 *See TRW Inc. v. Andrews*, 534 U.S. 19, __, 122 S. Ct. 441, 449 (2001) (if it can be prevented, no part of a statute, not even a word, should be rendered "superfluous, void, or insignificant") (internal quotation marks omitted); *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472, 117 S. Ct. 913, 917 (1997) ("legislative enactments should not be construed to render their provisions mere surplusage").

eliminate the uncertainty in the case law prior to SARA's enactment as to whether contribution was available under CERCLA at all. *See OHM Remediation Servs.*, 116 F.3d at 1581 (Garza, J.); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (3d Cir. 1997). The first and last sentences of § 113(f)(1) combine to afford the maximum latitude to parties involved in the complex and costly business of hazardous waste site cleanups.

III. DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AFTER ENACTMENT OF SARA

In numerous published cases decided after the enactment of SARA in 1986, this and other courts of appeals have ruled on CERCLA claims for contribution where no action had been brought under § 106 or § 107 of CERCLA.[21]

---

21 In the following cases, no action under § 106 or § 107 — and no federal administrative proceeding — had been brought before suit for contribution was initiated under § 113(f): *Bedford Affiliates*, 156 F.3d 416 (2nd [sic] Cir. 1998) (after negotiations with state agency, Bedford Affiliates agreed in consent order to begin cleanup, in course of which Bedford commenced action for contribution); *Crofton Ventures Ltd. P'ship v. G & H P'ship*, 258 F.3d 292, 294 (4th Cir. 2001) (Crofton Ventures notified state agency of contamination, cleaned up facility under agency's "supervision," then sued for contribution under § 113(f)); *Amoco, Inc.*, 889 F.3d at 672-73 (Amoco brought action against Borden "for contribution" after being "informed" by state agency of radioactivity); *Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 274 F.3d 1043, 1046 (6th Cir. 2001) (companies entered into consent order with state agency [*see* 107 F. Supp. 2d 817, 819-20 (W.D. Mich. 2000)] to fund remedial investigation and feasibility study, then sued other companies for contribution under CERCLA); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 613 (7th Cir. 1998) (after state agency "required" PMC to clean up site, PMC brought suit for contribution under § 113(f)); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 932-33, 935 (8th Cir. 1995) (Control Data reported findings of contamination to state agency, entered into consent decree with agency requiring it to

Hardly any of the decisions have explicitly parsed the language of § 113(f)(1),[22] but that fact weighs more in favor

---

investigate, monitor, and clean up contamination, installed remediation system, and then sued Schloff defendants for contribution); *Cadillac Fairview/California, Inc.*, 299 F.3d at 1024 (owner sued other PRPs for damages to cover expenses of investigating soil pollution; no indication in opinion that owner was sued beforehand; prior opinion in case states that testing activities were undertaken at request of state officials, 840 F.2d 691, 692-93 (9th Cir. 1988)); and *Morrison Ents. v. McShares, Inc.*, 2002 WL 1767540 at *1-*2 & *5 n.2 (10th Cir. Aug. 1, 2002) (after state agency ordered Morrison to investigate contamination, Morrison hired consulting firm, then sued McShares for contribution under CERCLA). *See also Fina, Inc. v. ARCO*, 200 F.3d 266 (5th Cir. 2000) (action for contribution and cost recovery under CERCLA). *Cf. New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 99-101, 104 (3d Cir. 1999) (state agency investigated site contamination in 1980s, issued directives to contribution defendants beginning in 1988, and entered into consent orders with them; in 1993, Turnpike Authority filed suit against contribution defendants; summary judgment affirmed for defendants on unrelated grounds, but opinion says Turnpike's "action against other PRPs is properly characterized as a § 113 action").

22 One case that seems to have come close, at the very least, to deciding this question is *Pinal Creek Group*, 118 F.3d 1298, *rev'g* 926 F. Supp. 1400 (D. Ariz. 1996). In that case, the Pinal Group voluntarily expended resources to clean up a waste site, then sued other PRPs for the costs of doing so. *Id.* at 1300; *Pinal Creek Group*, 926 F. Supp. at 1402 (after member of Group provided state agency with proposed action plan, agency "approved" plan; Group was formed, then began response activities "[w]ith the approval and under the oversight" of state agency). The Ninth Circuit rejected Pinal Creek Group's argument that it was entitled to bring a joint and several cost recovery action under § 107. *Id.* at 1303. Instead, the Ninth Circuit concluded that the Group's claim was for contribution, and that § 113 applied to the claim. *Id.* at 1306. The Ninth Circuit did not accept the Group's argument that allowing it a cost recovery action was appropriate because it "ha[d] not incurred any liability which would trigger" a contribution claim under § 113(f). *Id.* at 1305. Pinal Creek Group had contended "that the requisite liability only attaches if the government incurs response costs, arguing that before then, no liability exists under § 107(a), and that the Pinal Group's status as a

of than against our non-restrictive view of the provision. Given the enormous monetary exposure and the volume of litigation surrounding CERCLA mandates, one must assume that talented attorneys have had sufficient incentive and opportunity to explore statutory lacunae such as those created by a cramped reading of § 113(f)(1). Yet all that existed before this case arose are isolated dicta.[23] The absence of direct precedent is like the dog that didn't bark.[24]

PRP, by itself, does not give rise to a claim for contribution." *Id.* The court rejected this argument. Although "PRP status, by itself, does not generate liability," a PRP that incurs "necessary costs of response" for a hazardous waste site consistent with the National Contingency Plan thereby "bec[o]me[s] partly responsible for those costs" along with all other PRPs associated with the site, giving rise to a right of contribution under CERCLA. *Id. Cf. id.* at 1306 ("Under § 107, the Pinal Group's responsibility for its own equitable share of the cleanup costs is generated independently of any liability that might arise from response costs incurred by the government."). In other words, the Group was entitled to bring a claim for contribution simply because it was a PRP that had incurred necessary costs of response consistent with the National Contingency Plan. *See Fireman's Fund Ins. Co.*, 2002 WL 1792612 at *12 (CERCLA "explicitly authorizes any PRP that has incurred response costs to seek contribution from any other PRP.").

23 *See OHM Remediation Servs.*, 116 F.3d at 1580 ("A § 113(f) contribution action is derivative of an action under § 107(a), if only a pending one."); *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1241 (7th Cir. 1997) (stating that CERCLA "appears" to require that an action under § 106 or § 107(a) be "ongoing or already completed" before § 113(f)(1) is available," but noting that such a reading of the statute "seems to provide a disincentive for parties voluntarily to undertake cleanup operations"). *But cf. Geraghty & Miller, Inc.*, 234 F.3d at 924 (describing case involving claim for contribution under § 9613(f) as "a case that is neither a recovery claim under section 107 nor derivative of or responsive to any other formalized dispute").

24 Arthur Conan Doyle, *The Silver Blaze*, *in* Memoirs of Sherlock Holmes _____ ( ).

Moreover, the reasoning employed by the court in *Sun Co.*, 124 F.3d 1187 (10th Cir. 1997), favors our reading. In *Sun Co.*, the court held that § 113(f) governs actions for contribution brought by a PRP who had not incurred costs pursuant to a civil action under § 106 or § 107 but was itself subject to an administrative order under § 106. 124 F.3d at 1191. While deciding which CERCLA statute of limitations to apply to such claims, the court said that "PRPs who, like Plaintiffs here, incur cleanup costs pursuant to a unilateral administrative order (or by a consent decree, *or in some cases, voluntarily*) potentially have an unlimited time in which to bring their contribution claims." *Id.* (emphasis added). *See also id.* at 1192 ("PRPs who have incurred costs in some other way [than being sued under § 106 or § 107] are also covered by the language of § 113(f).").[25]

By creating doubt as to the meaning of § 113(f)(1), the dissent has thrown into uncertainty more than two decades of CERCLA practice, if the pre-CERCLA common law of contribution is included. Such a result may not be inconceivable, but it should place a heavy burden on the dissent to explain how its interpretation is justified under a "plain meaning" reading of the statute.

---

25 The court went on to explain how reading CERCLA in this way does not, in its view, wreak havoc with the framework set up in § 113(g) governing the limitations periods within which various CERCLA claims may be brought. *Sun Co.*, 124 F.3d at 1191-93. Compare *Geraghty & Miller, Inc.*, 234 F.3d at 924 (adopting *Sun Co.*'s reasoning as to "the appropriate statute of limitations to apply in a [CERCLA] case that is neither a recovery claim under § 107 nor derivative of or responsive to any other formalized dispute").

IV. POLICY CONSIDERATIONS

The dissent's reading of § 113(f)(1) would also create substantial obstacles to achieving the purposes of CERCLA — not only by slowing the reallocation of cleanup costs from less culpable PRPs to more culpable PRPs[26] and by discouraging the voluntary expenditure of PRP funds on cleanup activities,[27] but by diminishing the incentives for PRPs voluntarily to report contamination to state agencies. According to the dissent, even if the TNRCC had unambiguously ordered Aviall to engage in cleanup activities, this would not have triggered Aviall's right to contribution under CERCLA for the costs of such activities. We do not think these effects are required by a faithful reading of the statute.

The dissent hypothesizes that the negative effects of its holding would be mitigated because its reading of the last sentence of § 113(f)(1) allows a PRP to bring an action for contribution under state law. This is surely an inferior and questionable remedy for Congress to have embraced. Not all states allow contribution before the party seeking

---

26 This court has acknowledged that allowing parties who have been sued under CERCLA to bring contribution claims "makes possible the joinder of all potentially responsible parties in a single case, an early identification of potentially responsible parties for purposes of settlement, and . . . a single judicial apportionment of cleanup costs among responsible parties." *OHM Remediation Servs.*, 116 F.3d at 1583. The same purposes are achieved by allowing a PRP who has incurred cleanup costs to bring a contribution suit before he himself has been sued.

27 "Without the ability to require contribution from other responsible parties, the current operator may prefer to wait and let the government perform the work." *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1465 (9th Cir. 1986) (Reinhardt, J., dissenting).

contribution has been subjected to judgment.[28] And those that do follow quite different substantive and procedural rules.[29] Moreover, as the dissent acknowledges, some courts

---

28 The states vary greatly as to whether and to what extent they allow actions for contribution. As of 2000, six of the states, including Texas, had "contribution statutes limited to contribution between judgment debtors." *Restatement (Third) of Torts: Apportionment of Liability* § 23 cmt. a reporters' note, at 292 (2000). Texas law does provide, however, that "[a] person who conducts a removal or remedial action that is approved by the commission [that is, by the TNRCC, *see* Tex. Health & Safety Code Ann. § 361.003(5) (2001)] and is necessary to address a release or threatened release may bring suit in a district court to recover the reasonable and necessary costs of that action and other costs as the court, in its discretion, considers reasonable." Tex. Health & Safety Code Ann. § 361.344(a) (2001). "This right is in addition to the right to file an action for contribution, indemnity, or both in an appeal proceeding or in an action brought by the attorney general." *Id.* Louisiana law also provides for cost recovery for hazardous substance remedial actions, but its scheme is quite different from Texas's. *See, e.g.*, La. Rev. Stat. Ann. § 30:2276(G)(1) (West 2000) (providing, *inter alia*, that "those participating parties who, after an initial demand [for remedial action] is made by the secretary under R.S. 30:2275, agree to clean up the pollution source or facility may, without the institution of a suit by the secretary under R.S. 30:2275, sue and recover from any other nonparticipating party who shall be liable for twice their portion of the remedial costs"). The Mississippi statutes governing disposal of solid wastes, Miss. Code Ann. § 17-17-1 *et seq.*, do not appear to contain a provision for private cost recovery. *See* 57 Am. Jur. Trials 1 § 40 (2002). *Cf.* Miss. Code Ann. § 17-17-29(4) (1995 & Supp. 2002) ("Any person creating, or responsible for creating, through misadventure, happenstance, or otherwise, an immediate necessity for remedial or clean-up action involving solid waste shall be liable for the cost of such remedial or clean-up action and the commission may recover the cost of same by a civil action brought in the circuit court of the county in which venue may lie.").

29 *See Restatement (Third) of Torts: Apportionment of Liability* § 23 cmt. a reporters' note, at 291-92 (2000) (describing six categories of state contribution statutes and identifying two states that "recognize contribution without a statute"). *Cf.* 42 U.S.C. § 9613(f)(1) (2000)

of appeals have held that CERCLA preempts state-law claims for contribution for environmental cleanup costs.[30]

Policy considerations cannot change the interpretation of Congress's language, but they can contribute to an understanding of the language. This court's understanding, like that of most courts preceding and following enactment of § 113(f)(1), better fulfills the statutory purposes.

V. CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and remand the case for proceedings consistent with this opinion. This leaves to the district court, for determination in the first instance, two issues previously left unaddressed. 263 F.3d at 137 n.3. The first issue is whether Aviall failed to give timely notice to the EPA and the Attorney General of its action under CERCLA. The second is whether Aviall complied with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. Part 300, by failing to provide adequate opportunity for public participation. *See OHM Remediation Servs.*, 116 F.3d at 1583 (remanding for similar determinations).

REVERSED and **REMANDED**.

(providing that CERCLA contribution "claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law").

30 *See Bedford Affiliates*, 156 F.3d at 425-27; *PMC, Inc.*, 151 F.3d at 617-18; *In re Reading Co.*, 115 F.3d at 1117. We express no view on the preemption question.

EMILIO M. GARZA, Circuit Judge, with whom SMITH and BARKSDALE, Circuit Judges, join, dissenting:

The majority opinion holds that a party may bring an action for contribution under § 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9613(f)(1),[31] without being subject to a prior or pending § 106 or § 107 action. Because the majority's holding cannot be reconciled with the text or structure of the statute, I dissent.

The majority acknowledges the tenuous nature of its textual analysis by characterizing § 113(f)(1) as a provision whose "syntax is confused, its grammar inexact and its relationship to other CERCLA provisions ambiguous." The text is not so opaque as the majority opinion asserts.

---

31 Section 113(f)(1) provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1).

The first sentence of § 113(f)(1) provides: "[a]ny person *may* seek contribution from any other person who is liable or potentially liable under [§ 107(a)], *during or following* any civil action under [§ 106] or under [§ 107(a)]." 42 U.S.C. § 9613(f)(1) (emphasis added). The majority opinion reasons that the word "may" implies that contribution suits are permitted during the pendency of a § 106 or § 107 cost recovery action, but that a § 106 or § 107 action is not a prerequisite to a contribution suit. This analysis is problematic. The inclusion of the word "may" in an enabling provision generally establishes an exclusive cause of action. *See Resolution Trust Corp. v. Miramon*, 22 F.3d 1357, 1361 (5th Cir. 1994) (holding that the word "may," when included as part of an enabling provision, implies an exclusive cause of action); *see also* WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993) (defining "may" as "shall" or "must" "esp[ecially] in deeds, contracts, and statutes"). Thus, the word "may" in the first sentence of § 113(f)(1), the enabling provision, establishes that contribution suits must be brought "during or following" a civil action under § 106 or § 107.

The phrase "during or following" also indicates that § 113(f)(1) is available only after a primary cost recovery action commences. This phrase serves two purposes. First, it reflects the general legal proposition that contribution actions do not require the *execution* of a final judgment before they can be brought. *See* RESTATEMENT (SECOND) OF TORTS § 886A(1) (1977) ("[W]hen two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, *even though judgment has not been recovered* against all or any of them." (emphasis added)). Second, the phrase "during or following" imposes a limitation on the timing of CERCLA contribution suits. Section 113(f)(1) requires, as its language suggests,

that an initial cost recovery action commence before a contribution claim can proceed.[32]

Despite the limiting language in § 113(f)(1)'s enabling clause, the majority opinion concludes that the provision authorizes a party to sue for contribution in *any* circumstance. To justify this conclusion, the majority opinion focuses on the last sentence of § 113(f)(1) — the savings clause.[33] However, this clause does not authorize contribution actions under any and all circumstances. Section 113(f)(1)'s savings clause, like CERCLA's general savings clause, is best interpreted as expressly preserving *state law* causes of action.[34] When Congress meant to preserve *both* federal and state law causes of action, it said so

---

32 As reflected in its amicus brief to this Court, the Department of Justice, the federal government entity charged with the enforcement of CERCLA, adopts this interpretation.

33 The savings clause provides: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] or [§ 107]." 42 U.S.C. § 9613(f)(1).

34 Congress's inclusion of the phrase "civil action" provides support for this interpretation. "Civil action," as defined in the Federal Rules of Civil Procedure, has a specific meaning. FED. R. CIV. P. 2 provides: "[t]here shall be one form of action to be known as a 'civil action.'" When § 113(f)(1) uses the term "civil action," it is referring to an action brought in federal court. (Thus, § 113(f) permits contribution actions following an administrative remedial order only when the government files suit in federal court under § 106 to enforce the order.) This connection is further reinforced by § 113(f)(1)'s additional reference in the following sentence, which provides: "Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by federal law." 42 U.S.C. § 9613(f)(1). The savings clause, in contrast, references only an "*action* for contribution," which, by the absence of the word "civil," contemplates a proceeding in a non-federal forum, such as state court.

explicitly. *See* 42 U.S.C. § 9652(d) (CERCLA's general savings clause provides: "Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants"); *see also PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 617 (7th Cir. 1998) ("The purpose of CERCLA's [general] savings clause is to preserve to victims of toxic wastes the other remedies they may have under *federal or state law*.") (emphasis added).[35]

The practical effect of the majority opinion's holding is that § 113(f)(1)'s savings clause overrides its enabling clause. In other words, the enabling clause does nothing more than provide an example of when a contribution action *might* be brought.[36] This conflicts with elementary canons of statutory construction. An enacting sentence containing limiting language cannot be trumped by a savings clause purporting to save all other possible causes of action. Rather,

---

35 Other circuit court decisions have held that the federal contribution right codified in § 113(f) preempts all state law contribution claims. *See, e.g., PMC, Inc.*, 151 F.3d at 617-18 (holding § 113 preempts state law contribution actions); *Bedford Affiliates v. Sills*, 156 F.3d 416, 425-27 (2d Cir. 1998) (finding that § 113 preempts state law restitution and indemnification actions); *In re Reading Co.*, 115 F.3d 1111, 1117, 1119-20 (3d Cir. 1997) (holding CERCLA preempts any state law contribution claims). These decisions do not conflict with the interpretation advanced in this dissent. Following the reasoning of these courts, if a party does not seek to utilize the federal contribution provisions, it is still free to proceed under state law.

36 It is difficult to imagine that the drafters of § 113 deliberately included ambiguous language in the enabling clause, and then sought to clarify its meaning though the savings clause. *Cf. Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 420-21 (7th Cir. 1993) (declining to interpret savings clause in FIRREA in a manner that would "swallow up the specific language" of the provision).

any "repugnancy between the savings clause and the purview does not make the enacting part void but operates to invalidate the savings clause." 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.12 (6th ed. 2000). The majority opinion's interpretation of the savings clause, however, renders the enabling clause inoperative. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (citing the "elementary canon of statutory construction that a statute should be interpreted so as not to render one part inoperative").

It is also important to note that § 113(f)(1) does not create categories of liability, but rather relies on § 107(a)'s definition of liability and simply apportions costs among the liable parties. *See, e.g., Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997) (stating that § 113 "is no more than a mechanism for apportioning CERCLA-defined costs," and also noting that § 113 incorporates the liabilities set forth in § 107) (internal citations and quotations omitted). Prior to the passage of SARA, courts implied a contribution right from the language of § 107(a)(4)(B).[37] The

---

37 CERCLA, as originally enacted, did not include an express contribution provision. Instead, courts implied a contribution right from language in § 107(a)(4)(B). *See, e.g., Walls v. Waste Res. Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) ("Allowing a private action to recover response costs from responsible parties under [§ 107(a)(4)(B)] is thus consistent with both the language of [§ 107(a)(4)(B)] and with the congressional purpose underlying CERCLA as a whole."). In 1986, Congress, in an effort to expedite the clean-up of hazardous waste sites, passed the Superfund Amendments and Reauthorization Act ("SARA"). As part of SARA, Congress codified the right to contribution under CERCLA in the provisions set forth in § 113. *See* H.R. REP. NO. 99-253(I), at *78-79, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 ("It has been held that, when joint and several liability is imposed under section 106 or 107 of the Act, a concomitant right of contribution exists under CERCLA. . . . [§ 113(f)] clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties.").

overall structure of CERCLA's liability provisions demonstrates that § 113 is merely a subset of § 107, providing only for the *allocation* of CERCLA-defined liability. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994) ("Section 107 sets forth the scope of the liabilities that may be imposed on private parties and the defenses that they may assert").[38] Therefore, a § 113(f)(1) action should be contingent upon the commencement of a prior or pending cost recovery action under § 106 or § 107.

The structure of § 113 supports this interpretation. Section 113(g)(3), which sets out the applicable statute of limitations for contribution actions proceeding under § 113, suggests that a § 113(f)(1) action cannot proceed in the absence of an initial cost recovery action. This provision sets forth a three-year limitations period, which would begin to run following the date of judgment in a § 106 or § 107 action.[39] Significantly, the statute is silent as to the

---

38 The majority opinion quotes language from *Key Tronic*, in which the Supreme Court observed that CERLCA, as amended by SARA, "now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107." *Key Tronic*, 511 U.S. at 816. The Court did indeed acknowledge that both clauses provide parties with a way to recover clean-up costs. The Court did not find, however, that both clauses provide a way of allocating liability.

39 Section 113(g)(3) provides:

> No action for contribution for any response costs or damages may be commenced more than 3 years after—
>
> > (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

limitations period to be applied in the absence of a § 106 or § 107 civil action. Pursuant to the majority opinion's interpretation of § 113(f)(1), courts would be required to derive from some other source the limitations period to apply in this instance. Some courts have attempted to do just that, adopting the limitations period for initial cost recovery actions under § 113(g)(2)[40] and applying it to contribution actions proceeding in the absence of a § 106 or § 107 action.

> (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(3).

40 Section 113(g)(2) provides:

> An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—
>
> > (A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and
> >
> > (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

42 U.S.C. § 9613(g)(2).

See, e.g., Geraghty & Miller, Inc. v. Conoco, Inc., 234 F.3d 917, 924-25 (5th Cir. 2000) (finding that if there is no prior § 107 action, a § 113(f)(1) contribution must be brought within six years); *Sun Co.*, 124 F.3d at 1191-92 (same); *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994) (stating that a contribution action brought in the absence of an underlying § 106 or § 107 action must be brought within three years of the accrual of the right to contribution because contribution and initial cost-recovery actions are distinct remedies). Such herculean efforts are unnecessary. Section 113(g)(3)(A) provides that no action for contribution may be commenced more than three years after "the date of judgment in any action under this chapter for recovery of such costs or damages." 42 U.S.C. § 9613(g)(3)(A). There is no need to look outside of the contribution provisions in § 113(g)(3) to determine the appropriate limitations period.[41]

In sum, the plain language and statutory structure of CERCLA's contribution provisions demonstrate that the

---

41 In addition, § 113(f)(2) provides that "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2). Section 113(f)(3)(B), in turn, states that "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in [§ 113(f)(2)]." 42 U.S.C. § 9613(f)(3)(B). Taken together, these two sections create a powerful mechanism to encourage settlements by Potentially Responsible Parties ("PRPs") by protecting parties who settle from being sued in later contribution actions and granting a contribution right to those PRPs who enter into approved settlements. Allowing a contribution action to proceed in the absence of a pending § 106 or § 107(a) action would undermine these incentives.

contribution remedy in § 113(f)(1) requires a prior or pending § 106 or § 107 action.[42]

The majority opinion asserts that its interpretation of § 113(f)(1) is supported by existing precedent. However, the question presented here is one of first impression in the courts of appeals.[43] The handful of district courts attempting

---

42 As the majority opinion concedes, the legislative history of § 113(f)(1) does not contradict this statutory analysis. CERCLA did not include an explicit contribution provision until the passage of SARA in 1986. SARA's legislative history suggests that Congress intended to create only a limited federal contribution right when it enacted § 113(f)(1). For example, when explaining § 113(f) to the House of Representatives, the provision was described as "confirm[ing] a Federal right of contribution or indemnification for persons *alleged or held to be liable* under section 106 or 107 of CERCLA and prohibit[ing] the assertion of such rights against a party who has entered into a judicially approved settlement with the EPA." H.R. REP. NO. 99-253(I), at *79, *reprinted in* 1986 U.S.C.C.A.N 2835, 2861 (emphasis added). As evidenced by this statement, Congress intended there to be a prior or pending § 106 or § 107 action before a party could seek contribution from other PRPs. Further, when the Judiciary Committee amended a previous version of § 113(f)(1) to provide for contribution actions "during or following" a § 106 or § 107 action, the change was explained as "clarif[ying] and emphasiz[ing] that persons who settle with the EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties." H.R. REP. NO. 99-253(III), at *18, *reprinted in* 1986 U.S.C.C.A.N. 3038, 3041. The legislative history of § 113(f)(1) never states that a contribution action can be brought in the absence of a prior or pending cost recovery action. Had Congress intended to create such a broad contribution right, it would have done so explicitly.

43 While this and other appellate courts have addressed related questions concerning the proper interpretation of § 113(f)(1), none of them have specifically addressed the issue with which we are confronted: whether a § 106 or § 107 action is a statutory prerequisite to a § 113(f)(1) contribution action. *See OHM Remediation Servs. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574, 1582 n.2 (5th Cir. 1997) (permitting contribution claim against third-party defendant, but specifically stating

a statutory analysis of § 113(f)(1) have reached differing conclusions.[44] Thus, the case law provides no clear guidance on the interpretation of § 113(f)(1).

---

that the court "express[es] no opinion as to whether a party may be considered a PRP before being sued under CERCLA"); *Geraghty & Miller*, 234 F.3d at 925 (analyzing the statute of limitations provisions set forth in § 113(g)(2), and holding that a contribution action must be commenced within three years of the completion of removal action); *Crofton Ventures Ltd. P'ship v. G&H P'ship*, 258 F.3d 292, 297 (4th Cir. 2001) (permitting § 113 action to proceed after state-ordered cleanup, but failing to specifically address the language of § 113(f)(1)); *Bedford Affiliates*, 156 F.3d at 424 (permitting § 113 action after state-ordered cleanup, but never addressing what requirements are imposed by § 113's specific language); *PMC, Inc.*, 151 F.3d at 618 (holding § 113 preempts recovery under state contribution law); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1306 (9th Cir. 1997) (holding PRP is limited to recovery from other PRPs under § 113, and cannot utilize § 107); *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997) (noting in dicta that "a § 106 or § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available"). Because none of these circuit court decisions specifically confront the issue before us, we reject Aviall's contention that our interpretation conflicts with existing precedent. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) (holding that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

44 Several district courts have held that contribution under § 113(f)(1) is conditioned on the existence of a prior § 106 or § 107 cost recovery action. *See Estes v. Scotsman Group Inc.*, 16 F. Supp. 2d. 983 (C.D. Ill. 1998); *Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384, 1389 (N.D. Ill. 1988) (stating that "[d]efendants are correct that contribution is a remedy available to parties held liable, through judgment or settlement, in some damages actions. To receive any actual compensation through an action for contribution, the party must have been found liable as a defendant in an earlier or pending action."). For instance, in *Estes*, a case whose facts are strikingly similar to those here, a PRP undertook a cleanup of its contaminated property after receiving a letter from the state environmental agency. *Estes*, 16 F. Supp. 2d at 989-90. Following the

The majority opinion supports its analysis by focusing on policy concerns. In particular, the majority opinion asserts that requiring the commencement of a § 106 or § 107 civil action before a § 113 contribution action can be brought undermines CERCLA's goal of promoting prompt and effective clean-ups. The majority opinion's policy justifications ultimately amount to an assertion that there are more effective means of promoting private clean-ups than by conditioning the availability of § 113(f)(1) on a prior federal action or judicially approved settlement. However, when a statute's language and structure are clear, as in this case, it is unnecessary to consider such policy arguments. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). It is not our role to substitute our judgment for that of Congress when weighing the effectiveness of statutory provisions. Instead,

---

clean-up, the PRP filed a CERCLA claim against the prior owner under § 107(a) and § 113(f)(1). The district court dismissed the PRP's § 107(a) cost recovery action and then relied on the plain meaning of the statute to hold that the plaintiff could not seek contribution under § 113(f)(1) because the action was not "during or following" a cost recovery suit. *Id.* at 989 (stating that the "[s]ection 113(f) [claim] should be dismissed because there is no § 106 or § 107 claim pending").

In contrast, other district courts have adopted the majority opinion's interpretation and held that a contribution action can proceed in the absence of a prior or pending cost recovery action. *See, e.g., Coastline Terminals of Conn., Inc. v. USX Corp.*, 156 F. Supp. 2d 203, 208 (D. Conn. 2001) (allowing the plaintiff to assert a contribution claim under § 113(f)(1) in the absence of a pending or adjudged § 107 civil action); *Ninth Ave. Remedial Corp. v. Allis Chalmers Corp.*, 974 F. Supp. 684, 691 (N.D. Ind. 1997) (finding that a "PRP can bring a section 113 action even when no prior or pending section 106 or 107 civil actions have occurred").

we must adhere to the contribution scheme created by Congress.[45]

The text of § 113(f)(1) allows a contribution action only for those parties who are subject to a prior or pending § 106 or § 107 cost recovery action. I, therefore, respectfully dissent.

---

45 The majority opinion suggests that the interpretation advanced in this dissent violates the axiom that laws should be construed to avoid an absurd or unreasonable result. The plain meaning of the statute, which requires that a § 106 or § 107 action precede a contribution action under § 113(f)(1), does *not* lead to an absurd result. Contribution is readily available under the statute. The statute sets out three ways in which a party can achieve the right to seek contribution. First, an innocent party may bring a § 107 action against a PRP. Any party named in the § 107 action may subsequently bring a § 113 claim following the commencement of the initial § 107 action. Second, the government may bring an abatement action in federal court pursuant to § 106(b). At any point following the filing of the § 106 action in federal court, a named party can seek contribution from another PRP under § 113(f)(1). Finally, a PRP who has resolved its liability to the United States or a state in an administratively or judicially approved settlement can seek contribution pursuant to § 113(f)(3)(B). *See* H.R. REP. NO. 99-253(I), at *80, *reprinted in* U.S.C.C.A.N. 2385, 2862 ("Parties who settle for all or part of a cleanup or its costs, or who pay judgments as a result of litigation, can attempt to recover some portion of their expenses and obligations in contribution litigation from parties who were not sued in the enforcement action or who were not parties to the settlement."). Taken together, these three methods by which to obtain access to § 113(f)(1) effectively preserve and encourage CERCLA's important goals.

Nothing in § 113(f)(1) prevents a PRP from seeking contribution under state law. Section 113(f)(1)'s savings clause specifically preserves other contribution remedies. Aviall itself has taken advantage of state contribution law in its attempt to seek recovery of clean-up costs from Cooper. These alternate contribution remedies may ultimately expedite clean-up of contaminated sites by reducing the burden on the federal government to investigate and oversee all remediation efforts.

AVIALL SERVICES INC, Plaintiff-Counter Defendant-Appellant versus COOPER INDUSTRIES INC, Defendant-Counter Claimant-Appellee

---

No. 00-10197

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

December 19, 2001, Decided

Before KING, Chief Judge, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER, DENNIS and CLEMENT, Circuit Judges.

ON PETITION FOR REHEARING AND REHEARING EN BANC

BY THE COURT:

A member of the Court in active service having requested a poll on the petition for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-10197

AVIALL SERVICES, INC.,

Plaintiff-Counterdefendant-Appellant,

versus

COOPER INDUSTRIES, INC.,

Defendant-Counterclaimant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

---

August 14, 2001

Before WIENER, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Aviall Services, Inc. ("Aviall") appeals the summary judgment dismissal of its contribution claim based on the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613(f)(1). The district court ruled that Aviall could not seek contribution from Cooper Industries, Inc. ("Cooper") unless Aviall had incurred or at least faced liability under a CERCLA

administrative abatement or cost recovery action. We affirm, holding that the text of CERCLA requires this result.

I

Cooper ran an aircraft engine maintenance business at several of its industrial facilities. The rebuilding of aircraft engines required the use of petroleum and other hazardous substances, some of which seeped into the ground and groundwater through underground storage tanks and spills. Among the industrial facilities contaminated were Love Field, Carter Field and Forest Park (collectively, the "Facilities"). In 1981, Cooper sold its aircraft engine maintenance business, along with the Facilities, to Aviall. Several years later, Aviall began discovering some of the contamination that had occurred at the Facilities. Aviall admits, though, that the pollution of the Facilities continued under its stewardship as well.

Aviall notified the Texas Natural Resource Conservation Commission ("TNRCC") of the contamination at its Facilities. In turn, the TNRCC sent several letters to Aviall informing the company that it was in violation of Texas state environmental laws. Notably, the Environmental Protection Agency ("EPA") never contacted Aviall or designated the Facilities as contaminated sites. In 1984, Aviall began a decade-long environmental cleanup, spending millions of dollars. In early 1995, Aviall for the first time contacted Cooper seeking reimbursement. Aviall eventually sold the Facilities to another private party, but it contractually retained a continuing responsibility for the environmental cleanup.

In 1997, Aviall filed this lawsuit against Cooper based in part on CERCLA's § 107(a) "cost recovery" provision, which allows innocent persons to recover

environmental response costs from liable parties. Aviall later amended its complaint dropping the § 107(a) cost recovery claim, while adding contribution claims under § 113(f)(1) of CERCLA as well as under the Texas Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE ANN. § 361.344(a) (West 1992 & Supp. 2001), and the Texas Water Code, TEX. WATER CODE ANN. § 26.3513(j) (West 2000). The district court granted Cooper's motion for summary judgment, dismissing the § 113(f)(1) CERCLA contribution claim and then declining to exercise supplemental jurisdiction over the state law contribution claims. Relying on the plain language of the statute, the court held that Aviall could not assert a § 113(f)(1) contribution claim unless it was subject to a prior or pending CERCLA action involving either § 106 (federal administrative abatement action) or § 107(a) (cost recovery action by the government or a private party).[1]

On appeal, Aviall admits that neither the EPA nor any private party has filed a CERCLA claim against it. Notwithstanding this lack of federal action against it, Aviall claims that it can pursue CERCLA-based contribution because it voluntarily cleaned up the contamination, or at least it did so at the behest of a *state* environmental agency. Before discussing the merits of these arguments, we briefly review the structure and history of CERCLA.

---

1 The pertinent parts of the contribution provision read: "Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)], *during or following* any civil action under [§ 106] or under [§ 107(a)]. . . . Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] or [§ 107(a)]." 42 U.S.C. § 9613(f) (emphasis added).

II

Congress enacted CERCLA to facilitate the cleanup of hazardous waste sites, and to shift the costs of environmental response from the taxpayers to the parties who benefitted from the use or disposal of the hazardous substances. *See OHM Remediation Serv. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574, 1578 (5th Cir. 1997). The statute allows parties who incur environmental cleanup costs to recover from persons commonly referred to as "potentially responsible parties" ("PRPs"). *See* 42 U.S.C. § 9607(a). Subject to certain statutory exceptions, PRPs are broadly defined to include: (1) current owners and operators of vessels or facilities that accepted hazardous substances; (2) past owners or operators of facilities where hazardous substances were disposed; (3) persons who by contract or agreement arranged for the disposal or transport of hazardous substances; and (4) persons who accept or accepted hazardous substances for transport to disposal or treatment facilities. *See* 42 U.S.C. § 9607(a).

CERCLA provides two ways for parties to recover environmental response costs. The § 107(a) cost recovery provision permits the government or an "innocent" private party to recoup cleanup costs from PRPs. *See* 42 U.S.C. § 9607(a)(4) (stating that PRPs "shall be liable for—(A) all costs of removal or remedial action incurred by the United States Government or a State . . . [and] (B) any other necessary costs of response incurred by any other person. . ."). PRPs are held jointly and severally liable under this cost recovery provision. The other method of recovering environmental response costs involves § 113(f)(1), the contribution provision. *See* 42 U.S.C. § 9613(f)(1). It allows a PRP to seek contribution from other PRPs if it assumed a disproportionate share of the cleanup costs. Under § 113(f)(1), courts have the discretion to allocate the response costs equitably among the various PRPs. CERCLA

additionally includes a provision (§ 106) for the federal government to seek an administrative abatement order (enforceable in court) against PRPs. *See* 42 U.S.C. § 9606.

Courts have elaborated on the distinction between a contribution action under § 113(f)(1) and a cost recovery action under § 107(a). A contribution claim involves actions between PRPs, while a cost recovery suit is initiated by a non-responsible party against a PRP. *See, e.g., OHM*, 116 F.3d at 1583. Thus, a PRP cannot file a § 107(a) suit against another PRP; it must pursue a contribution action instead. *See id.* In the present case, Aviall and Cooper concede that they are both PRPs because they both contributed to the contamination of the Facilities.[2] The issue presented in this case is whether a PRP seeking a § 113(f)(1) contribution suit must have an ongoing or adjudged § 106 or § 107(a) action against it.

III

After examining the text and structure of CERCLA, we hold that a party can seek a § 113(f)(1) contribution claim only if there is a prior or pending federal § 106 or § 107(a) action against it.[3] While no directly binding case law exists, we believe that the majority of courts that have addressed this issue agree with our textual analysis. Moreover, the

---

2 Aviall accordingly dropped its § 107(a) claim in its amended complaint.

3 Cooper offered two additional, independent arguments why Aviall's contribution claim should be barred: (1) it failed to notify timely the EPA and the Attorney General of its private party CERCLA action; and (2) it did not comply with the National Contingency Plan by failing to provide adequate opportunity for public participation. We need not address these two arguments, given that we bar Aviall's contribution claim because of the lack of a pending or adjudged CERCLA claim.

legislative history, as a secondary source, reinforces our interpretation. We review the district court's grant of summary judgment de novo, construing all facts and inferences in the light most favorable to the nonmoving party. *See Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 241 (5th Cir. 1998).

A

Any analysis of a statutory provision must be tethered and true to the text. *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 356, 114 S. Ct. 1599, 1603, 128 L. Ed. 2d. **[sic]** 319 (1994) ("When interpreting a statute, we look first and foremost to its text"). The contribution section of CERCLA states: "Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)], *during or following* any civil action under [§ 106] or under [§ 107(a)]." 42 U.S.C. § 9613(f) (emphasis added).

A plain language reading of the statute requires a PRP seeking contribution from other PRPs to have filed a § 113(f)(1) claim "during or following" a federal CERCLA action against it. Aviall concedes that it did not file its § 113(f)(1) contribution claim "during or following" a § 106 or § 107(a) action against it, but it argues that neither action is necessary as long as it voluntarily cleaned up the Facilities. It alternatively contends that it can seek contribution because the TNRCC compelled it to clean up the Facilities—even though CERCLA does not expressly specify that contributions are allowed in the context of state agency enforcement orders.

We begin our analysis with the word "contribution" itself. The word "contribution" is defined as the "[r]ight of one who has discharged a common liability to recover of another also liable . . . . Under principle of 'contribution,' a

tort-feasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors . . . ." BLACK'S LAW DICTIONARY 329 (6th ed. 1990). As further explained in Sections C and D, we believe that the commonly accepted definition of contribution requires a tortfeasor to first face judgment before it can seek contribution from other parties.

Notwithstanding the definition of "contribution," Aviall claims that the statutory language of CERCLA supports its view. It first notes that under § 113(f)(1), "[a]ny person *may* seek contribution . . . during or following any civil action under [§ 106] or under [§ 107(a)]." 42 U.S.C. § 9613(f) (emphasis added). The key question is whether the use of the word "may" signifies an exclusive means for contribution (as in a party "may only" or "must" seek contribution during or following a CERCLA action), or a non-exclusive means for contribution (as in a party "may choose one of several ways" to seek contribution, and one way is during or following a CERCLA action). Aviall adopts the latter view, arguing that § 113(f)(1) does not affirmatively exclude contribution suits initiated under other circumstances. If the former view was intended, Aviall claims, Congress would have stated that a party "may only" seek contribution during or following CERCLA actions.

Aviall's analysis is inconsistent with our canons of statutory construction. Depending on the context, the word "may" can have the permissive definition of "have liberty to," or alternatively, it can denote exclusivity as in "shall [or] must." WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993). We have held that when the word "may" is used as an enabling provision creating a cause of action (as it is here), it establishes an exclusive cause of action and

means "shall" or "must."[4] Accordingly, a party can file a contribution claim only if it has been alleged or deemed liable under § 107(a) or if the federal government has ordered it to clean up contaminated sites under § 106.

Our reasoning in *Resolution Trust Corp v. Miramon*, 22 F.3d 1357 (5th Cir. 1994), is instructive. In *Miramon*, the Resolution Trust Corporation disputed the district court's interpretation of the Financial Institutions Reform, Recovery and Enforcement Act, which states that a "director or officer . . . *may* be held personally liable for monetary damages in any civil action . . . for gross negligence." *Id.* at 1360-61 (emphasis added). The issue was whether or not the statute adopted an exclusive gross negligence standard. The RTC offered the exact same argument that Aviall maintains today: it argued that "[i]f that section were meant to be exclusive . . . it would have said 'may only.'" *Id.* at 1361. We rejected that argument, holding that the word "may," when used in the context of establishing an enabling provision, creates an exclusive cause of action. *See id.* at 361 n.5 ("Read in context, the word 'may' refers to the right of the [RTC] to bring an action under this section. 'May' cannot reasonably be read to qualify the gross negligence standard"). Similarly in our case, the word "may" in CERCLA is used in the context of empowering a contribution action. Simply put, when a statute creates a cause of action, we must narrowly read the word "may" as establishing an exclusive enabling provision. Otherwise, we would "undermine[] the very cause of action the section creates" because the statute would then essentially open the floodgates for parties to pursue causes of

---

4 Thus, we reject Aviall's argument that Congress would have used the words "may only" if it had intended to create an exclusive cause of action. It has long been recognized that the word "may" can mean "shall" or "must . . . esp[ecially] in deeds, contracts, and statutes." WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993).

action through unspecified and unnamed methods. *Id.* at 1361. In fact, it would have been pointless for Congress to have expressly limited contribution suits to "during or following" a CERCLA action if a party could ignore that limitation and still seek contribution.

Aviall also relies on the last sentence of § 113(f)(1), the general savings clause: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] or [§ 107]." 42 U.S.C. § 9613(f). Aviall states that this clause reinforces its view that Congress intended to allow contribution suits, regardless of whether the parties are CERCLA defendants in a § 106 or § 107(a) action.

We reject Aviall's reading of the savings clause, and instead interpret it to mean that the statute does not affect a party's ability to bring contribution actions based on *state* law. If we adopted Aviall's interpretation, it would render superfluous the first sentence of § 113(f)(1), the enabling clause. As we noted in analyzing that sentence, why would Congress have incorporated an enabling provision (allowing parties to seek contribution "during or following" a § 106 or § 107(a) action) if a party could bring a contribution claim regardless of the enabling clause's "during or following" limitation? It makes little sense that Congress would codify the "during or following" limitation, and then expressly invalidate it within the very same section. Thus, the dissent is left to argue that the "during or following a civil action" language is not actually a limitation on when a party can seek contribution but rather "an express reaffirmation of the right to seek contribution before judgment," and further that the savings clause serves no purpose other than to "make abundantly clear" that point—just in case a reader might place an "overly restrictive reading" on the words "during or following." Put another way, the dissent seemingly argues that Congress deliberately made the meaning of the enabling

provision unclear, and then decided to clarify that ambiguity by adding a savings clause in the same section. We reject such an interpretation of the contribution section.

Additionally, we have held that "[r]eading the savings clause to nullify the substantive portion of the section would 'violate the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'" *Miramon*, 22 F.3d at 1361. Aviall's reading would further violate another canon of construction that the specific governs the general. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S. Ct. 2031, 2037, 119 L. Ed. 2d 157 (1992) (interpreting a savings clause). We will not read "CERCLA's savings clause . . . to gut provisions of CERCLA." *PMC, Inc. v. Sherwins-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998) (analyzing the CERCLA savings clause under 42 U.S.C. § 9652(d)).

A more reasonable reading of the savings clause suggests that Congress wanted to "merely nix an inference that the statute in which it appears is intended to be the exclusive remedy for harms caused by the violation of the statute." *Id.* More specifically, the savings clause was likely intended to preserve state law-based claims of contribution. *See id.* ("The purpose of CERCLA's savings clause is to preserve to victims of toxic wastes the other remedies they may have under federal or state law"); *see also Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384, 1389 (N.D. Ill. 1988) ("[W]e view the last sentence of [§ 113(f)(1)] . . . as an assurance that contribution remains available in other contexts, such as through Rockwell's claims for contribution under Illinois law"). Indeed, Aviall has done just that: it has filed contribution claims against Cooper under Texas state law, in addition to its § 113(f)(1) suit.

In short, we hold that, as a matter of statutory text and structure, CERCLA requires a party seeking contribution to be, or have been, a defendant in a § 106 or § 107(a) action.[5]

B

The legislative history of CERCLA reinforces our analysis of the statutory text. While legislative history sometimes is of limited value due to its potential ambiguity, it can nevertheless be useful when it overwhelmingly supports one side, as it does in this case. *See Boureslan v. Aramco*, 857 F.2d 1014, 1018 (5th Cir. 1988) (stating that "[l]egislative history is relegated to a secondary source behind the language of the statute in determining congressional intent; even in its secondary role legislative history must be used cautiously.")

The original CERCLA statute did not explicitly state whether one PRP could sue another PRP for contribution, although several district courts had implied such a right. In 1986, Congress amended CERCLA with the Superfund

---

5 The dissenting opinion argues that our reading of the statute is "contorted" because we acknowledge that a federal abatement *order* under § 106 can trigger the right of contribution under § 113(f)(1), which allows contributions "during or following any civil *action* under section 9606 [§ 106] of this title or under section 9607(a) [§ 107(a)] of this title." 42 U.S.C. § 9613(f)(1) (emphasis added). The dissent states that the word "action" usually refers to "lawsuits," and thus cannot include a federal abatement order. The language and structure of the statute suggest that the definition of the word "action" under § 113(f)(1) includes abatement orders. The contribution provision explicitly refers to § 106, which is entitled "Abatement actions." Under this heading of "Abatement actions," the section allows the President to "issu[e] such orders as may be necessary to protect public health and welfare and environment," and provides that the government can enforce these orders in court if a party refuses to comply with them. 42 U.S.C. § 9606(a), (b).

Amendments and Reauthorization Act ("SARA"), codifying an express contribution provision in § 113(f)(1). *See* 42 U.S.C. § 9613(f)(1). While Congress drafted CERCLA as a broad remedial statute, Congress equally made it clear in passing SARA that it intended only a *limited* federal right of contribution.

A House of Representatives conference report on SARA emphasized that a party seeking contribution must have first incurred (or at least must face potential) cleanup costs pursuant to either § 107(a) or § 106. The report stated, "This section clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties." H.R. REP. No. 00-253(I) (1985), *reprinted in* U.S.C.C.A.N. 2835, 1985 WL 25943 at 26 (Leg.Hist.) (emphasis added). The Senate's SARA report echoed the House's legislative intent. It explained that the new contribution provision permits "parties *found liable under sections 106 or 107* [to] have a right of contribution, allowing them to sue other liable or potentially liable parties to recover a portion of the costs paid." S. REP. NO. 99-11 at 43 (1985) (emphasis added).

The House report added that a contribution action exists even if a CERCLA action is merely pending: "The section contemplates that if an action under section 106 or 107 of the Act is under way, any related claims for contribution or indemnification may be brought in such an action." H.R. REP. NO. 00-253(I), 1985 WL 25943 at 26. The legislative history never mentions that SARA intended to allow contribution in the absence of either a pending or prior § 106 or § 107(a) action. The House report's emphasis that even a pending CERCLA claim is sufficient to allow contribution suits suggests that a PRP seeking contribution must, at the very least, have a CERCLA suit filed against it. As the House report declared, § 113(f)(1) was added to "confirm[] a Federal right of contribution or indemnification

for persons alleged or held to be liable under section 106 or 107 of CERCLA." *Id.*

C

The majority of the courts addressing § 113(f)(1) have agreed with our textual analysis. No federal circuit has yet directly weighed in on this question, but several district courts have discussed when a party can file a contribution action.

A helpful district court decision is *Estes v. Scotsman Group, Inc.*, 16 F. Supp. 2d 983 (C.D. Ill. 1998), a case factually similar to Aviall's situation. In *Estes*, Nicholas Estes purchased an industrial site contaminated with hazardous substances, which he moved and handled in violation of environmental regulatory guidelines. After the Illinois Environmental Protection Agency sent Estes an enforcement notice letter, he undertook a cleanup of the site. Estes then filed a CERCLA claim based on § 107(a) and § 113(f)(1) against the prior owner. The district court dismissed the § 107(a) cost recovery action because it held that Estes, as a PRP, could not file a cost recovery suit. The court then relied on the plain meaning of the statute to hold that Estes could not seek contribution under § 113(f)(1) unless that action was "during or following" a cost recovery suit or a federal administrative order against Estes. Because Estes was not a defendant in a CERCLA action, the court dismissed his § 113(f)(1) claim. *See id.* at 989 ("Section 113(f) [claim] should be dismissed because there is no § 106 or § 107 claim pending"). It did not matter to the court that Estes had received an enforcement notice letter from the state environmental agency, or that he may have cleaned up the sites voluntarily.

Similarly, another district court dismissed a PRP's contribution claim as "premature and improper" because the PRP was "yet to be found liable" under CERCLA. *See Deby, Inc. v. Cooper Indus.*, No. 99C2464, 2000 WL 263985, *6 (N.D. Ill. Feb. 29, 2000) ("Contribution is a remedy available to parties held liable, through judgment or settlement, in some damages action. . . . To receive actual compensation . . . the party must have been found liable as a defendant in an earlier or pending action.") (internal citations omitted). Several other district courts have reaffirmed this textual analysis of CERCLA's contribution provision. *See United States v. Compaction Sys. Corp.*, 88 F. Supp. 2d. [sic] 339, 350 (D.N.J. 1999) ("If the Settlors, by settling with the United States, meet the requirements of liability under Section 107(a) . . . Settlors may pursue apportionment under Section 113(f)(1) for that part of their expenditures that exceeds its share of liability"); *Southdown v. Allen*, 119 F. Supp. 2d 1223, 1245 n.41 (N.D. Ala. 2000) (citing the district court opinion of *Aviall v. Cooper* for the proposition that "[o]nce the district court determines who are responsible parties under § 107(a), the next step under § 113(f) is to allocate responsibility among the parties.") (citations omitted).[6]

In addition to these district courts, two Circuit courts—including this one—have suggested in dicta that a party cannot file a contribution claim unless it is a defendant

---

6 We note that while some district courts agree that a party filing a § 113(f)(1) action requires a prior or pending § 106 or § 107(a) claim against it, they add that a party who does not face such a claim can at least ask for a declaratory judgment in the event that it is found liable under CERCLA. *See Rockwell*, 702 F. Supp. 1384 (N.D. Ill. 1988); *Ameritrust Co. Nat'l Assoc. v. The Lamson & Sessions Co.*, No. 1:92CV008, 1992 WL 738774 (N.D. Ohio May 21, 1992); *Alloy Briquetting Corp. v. Niagara Vest, Inc.*, 756 F. Supp. 713 (W.D.N.Y. 1991).

in a federal cost recovery or administrative action. The Seventh Circuit analyzed the "during or following" language in § 113(f)(1), and said that "a § 106 or § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available." *Rumpke of Ind., Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1241 (7th Cir. 1997). While the Seventh Circuit's dicta, of course, does not bind this court, its textual analysis of § 113(f)(1) supports our interpretation of the contribution clause. This Circuit has similarly intimated that a § 106 or § 107(a) action must be pending or adjudicated for a party to pursue contribution costs. *See OHM*, 116 F.3d at 1574. Although *OHM* only addressed whether a PRP was limited to a contribution action, we nevertheless discussed the contours of § 113(f)(1), noting that it "allows parties to bring contribution actions at least as soon as they are sued under CERCLA." *Id.* at 1582. We then examined the common law roots of contribution, and implied that a party must be alleged or held liable before it can seek contribution: "Under the principle of 'contribution,' a tort-feasor *against whom a judgment is rendered* is entitled to recover proportional shares of judgment from other joint tort-feasors. *Id.* at 1582 (*citing* BLACK'S LAW DICTIONARY 328 (6th ed. 1990)) (emphasis added). Our reading of CERCLA's contribution provision is consistent with the common law definition: a contribution action can commence only if a party has already been found liable or faces potential liability.

A few district court cases have adopted the contrary view that a PRP can bring a § 113(f)(1) claim without first incurring or at least facing liability under either § 107(a) or § 106. *See Johnson County Airport Comm'n v. Parsonitt Co., Inc.*, 916 F. Supp. 1090, 1095 (D. Kan. 1996); *Ninth Ave. Remedial Group v. Allis Chalmers Corp.*, 974 F. Supp. 684 (N.D. Ind. 1997); *Mathis v. Velsicol Chem. Corp.*, 786 F. Supp. 971 (N.D. Ga. 1991). We disagree with the analysis in

these cases. For example, in *Johnson County Airport*, the district court allowed the contribution suit by relying on § 113(f)(1)'s savings clause. *See id.* (noting that the savings clause states that "nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under § 9606 or § 9607 of this title"). As we explained earlier in this opinion, the savings clause was only intended to preserve state-based contribution actions. Any other interpretation of the savings clause would render the enabling clause's "during or following" limitation a mere surplusage.

Aviall cites several other cases to support its contention that a § 106 or § 107(a) action is not required. None of them, however, is apposite. In *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000), G&M filed a private CERCLA claim against Conoco/Vista, who filed a counterclaim seeking relief under § 107(a) and § 113(f)(1). Later, G&M voluntarily dismissed its CERCLA claim, while Conoco/Vista dropped its § 107(a) claim, leaving only its § 113(f)(1) counterclaim. Aviall points out that the Fifth Circuit allowed Conoco/Vista's § 113(f)(1) contribution action to proceed.

Aviall's reliance on *Geraghty & Miller* is misplaced. First, unlike Aviall—which had never been a defendant in any CERCLA action—Conoco/Vista was a CERCLA defendant at the time it filed its contribution claim against G&M, and thus had met § 113(f)(1)'s "during or following" requirement. *Cf. OHM*, 116 F.3d at 1582 (stating that a party may be "potentially liable" in the context of a contribution claim if it is "simply . . . being sued under the statute"). Second, while *Geraghty & Miller* contains some helpful language for Aviall, we did not directly address whether a contribution suit could proceed without a prior or pending CERCLA action. Rather, we considered the only issue presented to us: which statute of limitation applies if a party

seeks contribution but none of the triggering events occurs.[7] G&M never raised the issue of whether Conoco/Vista could pursue its contribution claim, and thus the court did not directly address it.

Similarly, *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997), mentioned that a PRP might be able to undertake cleanup voluntarily. This dicta, however, was said only in the context of the appropriate statute of limitations period. *See also United Tech. Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96, 99 n.8 (1st Cir. 1994) (noting in dicta that "[i]t is possible that . . . a PRP who spontaneously initiates a cleanup without governmental prodding might be able to pursue an implied right of contribution under 42 U.S.C. § 9607(c)," but stating that it is "a matter on which we take no view").

Aviall also cites favorable language from *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 351 (6th Cir. 1998) ("It was enough that a plaintiff act under some compulsion or legal obligation to an injured when he or she discharged the payment"). The Sixth Circuit's ruling can be distinguished factually because the plaintiff in *Centerior* initiated a cleanup after the EPA had issued an administrative order under § 106. *See id.* at 346. Aviall has not received any such order from the EPA. Indeed, the *Centerior* court cautioned, "This case does not involve a PRP who initiated cleanup voluntarily without any governmental prodding, and we express no opinion" on that point. *Id.* at 352 n.10.

---

7 The statute of limitations for a § 107(a) claim is three years, while it is six years for § 113(f)(1). The statute provides three triggering events for a § 113(f)(1) claim: a prior judgment, an administrative order, or a judicially approved settlement. None of the triggering events occurred in Conoco/Vista's case. The court thus addressed which statute of limitations applies in these "gap" cases.

Lastly, Aviall lists a string of cases where a PRP undertook cleanup and then filed for contribution, although only a state agency had issued an administrative order against the PRP. *See, e.g., Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989). Aviall thus argues that the TNRCC's administrative orders were sufficient to allow it to proceed with its § 113(f)(1) claim. The facts section of these opinions admittedly mention **[sic]** only state agency enforcement. However, these cases are not dispositive for the simple fact that the parties for whatever reason did not raise the specific issue presented in our case: whether a PRP can seek contribution in the absence of a CERCLA action against it.[8]

D

Finally, Aviall makes a general policy argument that the district court's ruling would discourage voluntary cleanups because parties would not be able to seek contribution unless they were actually sued or faced EPA administrative orders. Some courts have conceded this disincentive, but have nevertheless ruled that Congress required this result. *See Rumpke*, 107 F.3d at 1240 ("We acknowledge, as other courts have, that this seems to provide a disincentive for parties voluntarily to undertake cleanup operations, because a § 106 or § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available. This appears to be what the statute requires, however"). We agree that the text trumps policy

---

8 For the same reason, we reject Aviall's argument that the Seventh Circuit in *PMC*, 151 F.3d at 610, implicitly overruled *Estes*, 16 F. Supp. 2d at 983, which held that a § 113(f)(1) suit is invalid without a § 106 or § 107(a) action. In *PMC*, one party cleaned up the sites at the behest of the state agency and then sought contribution, but the opposing party never raised or disputed whether such contribution actions were permissible.

preferences, and that we cannot substitute Congress' wishes with our own.

In any event, we believe that our interpretation of the statute is wholly consistent with the policy goals of CERCLA. When Congress passed SARA, it did not intend to create an expansive federal cause of action. As the legislative history shows, Congress wanted only a limited right of contribution when parties are found or alleged to be liable under CERCLA. *See* S. REP. NO. 99-11 at 44 (stating that § 113(f)(1) "clarifies and confirms the [judicially recognized] right of a person held jointly and severally liable" to seek contributions). It seems unlikely that Congress enacted a contribution right broad enough to encompass Aviall's situation, where neither the federal government nor any private party has filed a CERCLA action against it, and the EPA has not designated Aviall's Facilities as contaminated sites. Furthermore, Congress probably did not intend to go beyond the traditional common law definition of contribution in drafting CERCLA's contribution provision. *See OHM*, 116 F.3d at 1574 (defining the common law definition of contribution as requiring a pending or prior judgment). In short, we do not believe that Congress wanted to afford a federally-based contribution right to a party merely because a state agency had found it to have violated a state environmental law.

We also doubt that our interpretation of § 113(f)(1) will necessarily discourage voluntary cleanups. Parties may be able to rely on state environmental laws to recover costs from other liable parties. Indeed, Aviall is alternatively seeking contribution from Cooper based on two Texas statutes. That option remains open despite our ruling today.

IV

After examining CERCLA's text, legislative history and case law, we hold that a PRP seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it.

AFFIRMED.

WIENER, Circuit Judge, dissenting:

In reaching its holding that a PRP can only sue another PRP on a § 113(f)(1) contribution claim if a § 106 administrative order or § 107(a) action has been brought against it, the panel majority claims to have applied a "plain-meaning" analysis to the statute; yet it obviously has glossed over clear statutory language declaring that "[n]othing in [§ 113(f)(1)] shall diminish the right of any person to bring an action for contribution *in the absence of a civil action under [§ 106] . . . or [§ 107(a)][.]*"[9] I respectfully dissent because I am convinced that a full and fair reading of § 113(f)(1) in the context of CERCLA as a whole — and without judicially legislating into that section of the statute two words that are indispensable to the majority's position but that Congress elected to omit — does not require a PRP seeking contribution from another PRP for CERCLA liability to wait until a § 106(a) order or § 107(a) action is filed against it.

I. THE TEXT

Neither I nor anyone else can quarrel with the majority's incantation of the truism that when we analyze a

9 42 U.S.C. § 9613(f)(1) (emphasis added).

statute we must look first and foremost to its language. Accordingly, I begin with the full text of § 113(f)(1):

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [§ 107(a)] of this title, during or following any civil action under section 9606 [§ 106] of this title or under section 9607(a) [§ 107(a)] of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.[10]

We cannot simply analyze statutory terms in a vacuum, however, but are constrained to consider them in the context of the statute as a whole.[11] The majority perverts this canon of statutory construction by seizing on and unduly elevating

10 *Id.*

11 *See Gade v. National Solid Wastes Management Assn.*, 595 U.S. 88, 99 (1992) ("[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law.") (internal quotation marks and citations omitted, brackets in original).

the phrase "during or following" in § 113(f)(1) to the pedestal of exclusivity while (1) trivializing Congress's palpable (and presumably intentional) refusal to insert the word "only" to modify the phrase "during or following any civil action" in the first sentence of this section or to insert the word "state" to modify the phrase "action for contribution" in the final sentence (the "savings clause"), (2) ignoring the universally accepted legal meaning of "civil action" as congruent with and limited to "lawsuit," (3) shunning the full import and significance of the contextually critical but statutorily undefined term "contribution," and (4) refusing to recognize the breadth of the savings clause. I submit, and shall proceed to demonstrate, that these distortions of the methodology of statutory construction mortally wound the majority's announced exercise of that process.

For openers, nowhere does the plain language of the statute specify that actions for contribution are allowed "only" during or following litigation under CERCLA. Thus the majority's holding — "that a party can seek a § 113(f)(1) contribution claim *only* if there is a prior or pending federal § 106 or § 107(a) action against it" (emphasis added) — boldly rewrites the statute by imposing the extra-congressional restriction that the savings clause itself affirmatively rejects: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution *in the absence of a civil action under [§ 106] of this title or [§ 107(a)] of this title*."[12] I find baffling the majority's dismissive reference to Aviall's argument — that the absence of the word "only" from the statute at least raises a question as to whether the "during or following" language is exclusive — as "inconsistent with our canons of statutory construction" because I am aware of no canon that gives the

12 *See* 42 U.S.C. § 9613(f)(1) (emphasis added).

judiciary a license to rewrite statutory language. To the contrary, it is not our province to add even one word to a statute — here, to restrict its reach — when Congress itself has chosen not to include that word and thus not to limit the scope of the statute. It is obvious that, by inserting the word "only" into the statute, the majority has converted a permissive provision to one of exclusivity. When Congress wants to make a statute exclusive, it certainly knows how to do so.[13]

The majority's related attempt to cabin the savings clause by insisting that it means nothing more than that "the statute does not affect a party's ability to bring contribution actions based on *state* law" is yet another judicial trespass on the legislative turf. In this instance, the majority's interpretation of the savings clause requires still another insertion of an omitted word — "state" — thereby creating a distinction that Congress did not see fit to make and that we of the "Third Branch" should not presume to legislate. When Congress intends to distinguish between federal and state law, it certainly knows how to do so. For instance, CERCLA's general savings clause provides,

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under *other Federal or State law, including common law*, with respect to releases of hazardous substances or other pollutants or contaminants.[14]

13 *See, e.g.*, 2 U.S.C. § 437d(e) ("Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act.").

14 42 U.S.C. § 9652(d).

If, as the majority contends, Congress meant for the savings clause merely to acknowledge that a party seeking contribution for environmental clean-up may bring a *state* action in response to *state* orders or judgments (something Congress need not say or do because — short of making CERCLA preemptive — it cannot prohibit it) surely Congress would have made that distinction explicit, as it did in CERCLA's general savings clause.[15]

Second, the majority's own conclusion that a PRP seeking contribution from other PRPs "must have a pending or adjudged § 106 *administrative order* or § 107(a) cost recovery action against it" (emphasis added) puts the lie to its contorted reading of the savings clause. Section 113(f)(1) states that a PRP may seek contribution "during or following any *civil action* under [§ 106] or under [§ 107(a)]."[16] Administrative orders are not "civil actions." They are not "actions" at all.[17] And no amount of saying so can make it so. The majority's Orwellian insistence that the term "civil actions" includes "administrative orders" stretches the language of the statute beyond the breaking point — needlessly, because the savings clause makes clear that "the

15 The majority's reliance on *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998), is thus misplaced, as the analysis in that case focused on CERCLA's general savings clause with its express preservation of state-law claims.

16 *See* 42 U.S.C. § 9613(f)(1) (emphasis added). Section 106(a) authorizes an administrative order requiring a private party to clean up a site. *See* 42 U.S.C. § 9606(a). If the party refuses to do so, then § 106(b)(1) authorizes the EPA to bring an action in federal district court to enforce the order. *See* 42 U.S.C. § 9606(b)(1).

17 *See* Black's Law Dictionary 28 (6th ed. 1990) ("['Action'] in its usual legal sense means a lawsuit brought in a court[.]").

absence of a civil action under [§ 106]" is not fatal to a PRP's attempt to seek contribution under § 113(f)(1).[18]

The majority cannot have it both ways. If, as the majority claims, the language of the savings clause means only that § 113(f)(1) does not preempt state-law contribution claims, then not even an abatement order issued pursuant to § 106(a) triggers a PRP's right to seek contribution under § 113(f)(1), because such an administrative order is not a "civil action" during or following which a contribution claim may only, as the majority would have it, be brought. No amount of interpretive sleight-of-hand on the majority's part can avoid this logic. Thus the majority's assertion that a PRP can file a contribution claim "if the government has ordered it to clean up contaminated sites under § 106" flatly contradicts its own (erroneous) interpretation of the savings clause as merely preserving state-law remedies. When properly interpreted, the language of the savings clause makes clear that a PRP may "bring an action for contribution *in the absence of a civil action* under [§ 106] . . . or [§ 107(a)]"[19] — and I see nothing in the statute to justify the majority's dubious distinction between *federal* administrative orders, which, as even the majority agrees, trigger contribution claims under § 113(f)(1), and *state* administrative orders which, the majority has decreed, somehow do not.

Third, the majority unquestionably misspeaks by adopting its own uniquely narrow definition of the critical statutory term "contribution." As § 113(f)(1) does not define the term "contribution," we must abide by the well-established maxim of interpretation that legal terms not

18 *See* 42 U.S.C. § 9613(f)(1).

19 *See* 42 U.S.C. § 9613(f)(1) (emphasis added).

defined in a statute are ordinarily presumed to convey their customary legal meaning and accord the term "contribution" its full common-law meaning: "[W]here Congress borrows terms of art . . . it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken[.]"[20] This tenet of statutory construction is especially important when, as here, Congress legislates in an area formerly governed by federal common law. As we have explained,

> Section 107 was the sole statutory basis for recovery of response costs in the original CERCLA statute, which contained no provision for apportioning costs among PRPs. Cases under the original statute threatened minor polluters with joint and several liability, which prompted courts to find an implicit, federal common law right to contribution. The SARA amendments, including section 113, codified the federal common law right of contribution. A principal objective of the new contribution provision was to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost

20 *Morisette v. United States*, 342 U.S. 246, 263 (1952).

> that may be greater than its equitable share under the circumstances."[21]

We are constrained to "take it as a given that Congress has legislated with an expectation that the [common-law] principle will apply except when a statutory purpose to the contrary is evident."[22]

The term "contribution," as this court has explained, "is best understood in its customary sense as a term of art referring to actions brought among potentially responsible parties."[23] Black's Law Dictionary defines "contribution" as the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear."[24] Similarly, the Restatement (Second) of Torts provides, "when two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, *even though judgment has not been recovered against all or any of them*"[25] and even

21 *OHM Remediation Services v. Evans Cooperage Co.*, 116 F.3d 1574, 1581 (5th Cir. 1997) (Garza, J.) (internal citations omitted) (*quoting* S. Rep. No. 99-11, at 44 (1985) ("[Section 113] clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.").

22 *United States v. Texas*, 507 U.S. 529, 534 (1993) (internal quotation marks and citation omitted).

23 *OHM*, 116 F.3d at 1582 (emphasis added).

24 Black's Law Dictionary at 328 (emphasis added).

25 Restatement (Second) of Torts § 886A (2d ed. 1979) (emphasis added).

"without . . . suit against [them]."[26] American Jurisprudence Second elaborates:

> The equity for contribution arises at the time of the creation of the relationship between the parties which gives rise to the right and ripens into a cause of action for reimbursement in favor of a party when, under a legal duty, he satisfies, by payment or otherwise, more than his just proportion of the common obligation or liability. Or, stated in terms applicable to actions at law, the implied promise to contribute is considered as made at the time the common liability is assumed, *and the right to sue thereon arises when a party has paid the whole of the obligation or more than his share thereof.*[27]

None of these authorities requires, as a condition precedent, that a party be sued or adjudged liable before seeking contribution; rather, the right to seek contribution arises independently when one tort-feasor, acting under a legal duty, discharges more than his fair share of a liability shared by joint tort-feasors.

I acknowledge that some jurisdictions have statutorily restricted the right to seek contribution to actions between

---

26 *Id.* at § 886A cmt. b.

27 *See* 18 Am. Jur. 2d *Contribution* § 9 (1985) (emphasis added) (footnotes omitted).

tort-feasors against whom judgment has been rendered.[28] Eschewing any such limitation, however, the "during or following" language in § 113(f)(1) confirms that a PRP need not wait until it is hit with a final judgment in a court of law to seek contribution from other PRPs for CERCLA liability. Far from restricting the right to seek contribution, the "during or following" language embraces the more expansive Restatement view that a tort-feasor may seek contribution from joint tort-feasors "even though judgment has not been recovered against all or any of them."[29]

One might argue, as does the majority, that by expressly providing for contribution "during or following" a civil action under § 106 or § 107(a), Congress impliedly excluded the common-law right to seek contribution in the absence of suit. Obviously mindful of the possibility of such an overly restrictive reading, Congress took explicit care to add the savings clause, thereby foreclosing this narrow construction of the statute: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution *in the absence of a civil action under [§ 106] of this title or [§ 107(a)] of this title.*"[30]

Unlike the majority, I read the savings clause to mean precisely what it says: *Nothing* in § 113(f)(1) — particularly not its "during or following" language — diminishes the right of any person to bring an action for contribution *in the absence of a civil action under § 106 or § 107(a).* Just as the "during or following language" confirms that the class of those who have the "right . . . to bring an action for

---

28 *See* W. Page Keeton Et Al., *Prosser and Keeton on the Law of Torts* § 30, at 338 (5th ed. 1984) (collecting cases).

29 *See* Restatement (Second) of Torts at § 886A.

30 *See* 42 U.S.C. § 9613(f)(1) (emphasis added).

contribution" is not limited to PRPs against whom a judgment already has been rendered, the savings clause clarifies that a PRP may seek contribution in the absence of suit so long as the prerequisites for a contribution claim have otherwise been met.

Rather than deal squarely with this argument, the majority opts to mischaracterize it. My argument is neither that Congress "deliberately" made the enabling provision "unclear," nor that it intended the savings clause to "clarify" any such ambiguity. To the contrary, my argument tracks Congress's own stated intentions of "clarif[ying] and confirm[ing]" the federal common-law right to seek contribution from other potentially liable parties under CERCLA. Thus I maintain that the "during or following" language itself clarifies, in the face of contrary authority, that a party need not wait until judgment is rendered to seek contribution under § 113(f)(1).

The savings clause, then, serves as a prior restraint to rebut any unintended inference of *expressio unius* lest some court in the future try to ascribe that maxim to the language. Stated differently, the savings clause rules out any construction that would purport to read "during or following" as the exclusive portal through which a contribution claim must pass. Particularly in the absence of the word "only" preceding the phrase "during or following," the savings clause makes abundantly clear that "during or following" are but two of the many times and circumstances when one PRP may seek contribution from another.

The majority's reliance on *Resolution Trust Corp. v. Miramon*[31] is thus misplaced. The statute at issue in that case *abrogated* a federal common-law provision, whereas in our

---

31 22 F.3d 1357 (5th Cir. 1994).

case, section § 113(f)(1) "*confirms*" the federal common law of contribution under CERCLA. Furthermore, the savings clause at issue in *Miramon* expressly stated that "[n]othing in this paragraph shall impair or affect any right of the [Resolution Trust] Corporation under *other applicable law*."[32] Focusing on the term "other," we concluded that the savings clause did not preserve federal common law actions for simple negligence when the enabling provision of the statute solely referenced actions for gross negligence:

> The savings clause provides that the RTC's rights under *other* applicable law will not be impaired or affected. This clearly implies that the RTC's rights under *some* law is being impaired or affected. Under the RTC's construction of the savings clause, though, there is no law that is impaired or affected because all previous common law remains effective and [the statute] merely grants the RTC an additional option. Had Congress intended this result it would have drafted the clause to read that "[n]othing in this paragraph shall impair or affect any right of the Corporation under any applicable law.[33] **[sic]**

The language of § 113(f)(1)'s savings clause, however, is even more expansive and explicit in preserving the PRP's common-law right to bring an action for contribution in the

---

32 *See* 12 U.S.C. § 1821(k) (emphasis added).

33 *Miramon*, 22 F.3d at 1361 n.6.

absence of suit: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] of this title or [§ 107(a)] of this title."[34] Unlike the statute at issue in *Miramon*, section 113(f)(1) contains no language even remotely suggesting that the "during or following" language is meant to be exclusive or restrictive. Neither is there anything that expressly or implicitly limits the savings clause to *state* "actions." In view of Congress's express intention to "confirm" the federal common law of contribution under CERCLA, I must disagree with the majority when it insists that we should read into § 113(f)(1) a limitation on the right to seek contribution that a straightforward reading of the plain language of the statute expressly rejects.

II. LEGISLATIVE HISTORY

The majority's resort to legislative history to shore up its problematical reading of the statute aptly demonstrates the pitfalls of traversing such uncertain terrain, especially when — as here — there is no claim or finding of ambiguity. In support of its bald assertion that the legislative history "overwhelmingly supports" its reading of the statute, the majority fecklessly relies on House and Senate reports that address markedly different, and ultimately abandoned, versions of what would later become the enacted version of § 113(f)(1). The subsequently abandoned version under consideration by the Senate at that time provided that "*[a]fter judgment* in any civil action under section 106 or [§ 107(a)], *any defendant* held liable or potentially liable in the action may bring *a separate action* for contribution against any other person liable or potentially liable under [§ 107(a)]."[35]

---

34 *See* 42 U.S.C. § 9613(f)(1).

35 S. Rep. No. 99-11, at 103 (1985) (emphasis added). The savings clause read as follows: "Except as provided in paragraph (4) of the subsection, this subsection shall not impair any right of indemnity under existing law." *Id.*

Similarly, the subsequently abandoned version under consideration by the House at that time provided that "any *defendant alleged or held to be liable* in an action under section 106 or section 107 may bring an action for contribution or indemnity against any other person liable to [sic] potentially liable."[36] If, despite the absence of ambiguity in the statute, the majority would invoke legislative history (generally perceived to be a sign of weakness in a proposed reading of a statute), it should at least limit its reliance to that part of the history that addresses the version of the legislation that Congress actually adopted into law.

By any standard, the language of the statute ultimately enacted by Congress is more permissive than either of the more restrictive versions on which the legislative history cited by the majority comments. The legislative history does not reveal reasons for these changes, and I hesitate to place too much weight on what may be a slim reed. At a minimum, though, it can hardly be said — at least not without blushing — that the legislative history supports the majority's contention that "Congress . . . made it clear in passing SARA that it intended only a *limited* federal right of contribution."

The majority would also make much of the fact that the legislative history "never mentions that SARA intended to allow contribution in the absence of either a pending or prior § 106 or § 107(a) action." I am mystified by the majority's willingness to cast aside its healthy skepticism

---

36 H.R. Rep. No. 99-253, pt. 1, at 188 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2862 (emphasis added).

about legislative history to read so much into the *absence* of legislative discussion on this issue, especially when the plain language of the statute, through its savings clause, *expressly* contemplates actions for contribution in the absence of civil actions under § 106 or § 107(a). Surely the majority has not forgotten Justice Scalia's admonition that we are not concerned with what Congress *intended*, but what it *enacted*: "[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[37]

The one thing — perhaps the only thing — that is clear from the legislative history is that § 113(f)(1) "clarifies and confirms" the federal common-law right to seek contribution from other potentially liable parties under CERCLA.[38] Taken together, (1) Congress's intentional omission of "only" before "during or following," and of "state" before "action in the savings clause, (2) the expansive common-law understanding of the term "contribution" to include actions instituted prior to suit or judgment, (3) the necessity of the "during or following" language as an express re-affirmation of the right to seek contribution before judgment, and (4) the broad language of the savings clause, convince me that the plain and unambiguous language of the statute enacted by Congress does permit a PRP, such as Aviall, to seek contribution in the absence of a civil action under § 106 or § 107(a) as well as during or following such an action.

---

37 *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

38 S. Rep. No. 99-11, at 44 (1985).

III. CASE LAW

The majority admits, as it must, that in a "string of cases," federal courts of appeal (including this one) have permitted § 113(f)(1) contribution suits to go forward in the absence of civil actions under § 106 or § 107(a).[39] Most recently, in *Crofton Ventures LP v. G & H Partnership*,[40] the Fourth Circuit, in an opinion authored by Judge Niemeyer, allowed a § 113 suit by a PRP who, just like Aviall, had notified a state environmental agency of the contamination and then cleaned up the facility. It was of no moment in *Crofton* that neither an administrative charge nor a § 106 or § 107 action had been brought against the plaintiff in that case.

True enough, whether a party may seek contribution under § 113(f)(1) in the absence of a CERCLA action against it was not a contested issue in any of these cases. But albeit tacit, that phenomenon only underscores the common understanding among courts and litigants alike that the plain language of § 113(f)(1) does not require a PRP to wait until it is haled into court to seek contribution under the statute.

Faced with this line of federal appellate cases, what does the majority choose to rely on but a district court case — from another circuit — *Estes v. Scotsman Group, Inc.*,[41]

---

39 *See, e.g., Amoco Oil v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989) (permitting contribution claim under § 113(f)(1) to proceed in the absence of a civil action under § 106 or § 107(a)); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998); *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998); *Sun Company, Inc., v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997).

40 No. 00-1517, 2001 WL 829885 (4th Cir. July 24, 2001).

41 16 F. Supp. 2d 983 (C.D. Ill. 1998).

which in turn relied on dicta from the Seventh Circuit's opinion in *Rumpke of Indiana, Inc. v. Cummins Engine Co,* **[sic]** *Inc.*:[42]

> We acknowledge, as other courts have, that this seems to provide a disincentive for parties voluntarily to undertake cleanup operations, because a § 106 or § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available. This appears to be what the statute requires, however.[43]

In *Ninth Ave. Remedial Group v. Allis Chalmers Corp.*,[44] however, a different district court in the same circuit refused to "be guided by the equivocal dicta in *Rumpke*" and held that "[i]n light of the express language of Section 113(f)(1) . . . [a] PRP can bring a section 113 action even when no prior or pending section 106 or 107 civil actions have occurred."[45]

Similarly, in *Mathis v. Velsicol Chemical Corp.*,[46] a district court in the Eleventh Circuit rejected an attempt to plead, as an affirmative defense to a § 113(f)(1) claim, that "no civil action under [§ 106] or [107(a)] is pending."[47]

---

42 107 F.3d 1235 (7th Cir. 1997).

43 *Id.* at 1241.

44 974 F. Supp. 684 (N.D. Ind. 1997).

45 *See id.* at 691.

46 786 F. Supp. 971 (N.D. Ga. 1991).

47 *Id.* at 975. The plaintiffs' state-law claims alleged nuisance and trespass to land.

Underscoring the broad language of the savings clause, the *Mathis* court held that § 113(f)(1) "by its plain terms and meaning prevents . . . [the maintenance of] a defense concerning the pendency of a civil action under CERCLA."[48] Likewise, in *Johnson County Airport Comm'n v. Parsonitt Co., Inc.*,[49] the district court held that "nothing in the language of section 113(f)" prohibits a PRP from asserting claims for contribution under the statute in the absence of a civil action under § 106 or § 107(a).[50] Most recently, in *Coastline Terminals of Connecticut, Inc. v. USX Corp.*,[51] the district court held that a § 113(f)(1) claim is not barred merely because the PRP has not been threatened with liability in the form of a § 106 or § 107 action.[52] The majority begrudgingly acknowledges these cases but makes little effort to contend with their reasoning and analysis.

Instead, the majority cobbles together a hodgepodge of other district court cases, none of which is apposite. For example, the district court in *Deby, Inc. v. Cooper Indus.*[53] dismissed the PRP's contribution claim as "premature and improper" because the PRP had "yet to be found liable" in a CERCLA action then actually pending against the PRP in another district court. The *Deby* court therefore concluded that "[i]t would run contrary to judicial economy, efficiency,

---

48 *Id.*

49 916 F. Supp. 1090 (D. Kan. 1996).

50 *See id.* at 1095.

51 No. 3:00CV1698(WWE), 2001 WL 844722 (D. Conn. June 12, 2001).

52 *See id.* at *3.

53 No. 99C2464, 2000 WL 263985 (N.D. Ill. Feb. 29, 2000).

and consistency to have t[w]o courts determine Deby's liability."[54]

The majority likewise cites the district court opinion in *United States v. Compaction Sys. Corp.*[55] for support, but that case merely held that the act of settling with the United States satisfies § 113(f)(1)'s liability requirement even though there has been no formal admission of liability.[56] In the same vein, the majority cites to the district court's opinion in *Southdown v. Allen*[57] even though it has no applicability whatsoever to the instant case. In *Southdown*, the defendants argued that the plaintiff had abrogated the right to seek cost recovery or contribution under CERCLA through *contract*; discussion in that case appropriately centered on the defendants' argument that the plaintiff's cleanup costs had been incurred "voluntarily" pursuant to a contractual agreement between the parties and were therefore unrecoverable under § 113(f)(1).[58] In short, none of these district court cases from other circuits either supports the majority or offers any help in resolving the issue of first impression presented here: whether, in the absence of a civil action under § 106 or § 107(a), the statute permits a PRP who has incurred cleanup costs pursuant to a state administrative order to bring a § 113(f)(1) contribution action in federal court.

---

54 *See id.* at *5.

55 88 F. Supp. 2d 339 (D.N.J. 1999).

56 *See id.* at 351.

57 119 F. Supp. 2d 1223 (N.D. Ala. 2000).

58 *Id.* at 1245.

I recognize that the district court in *Rockwell Intern. Corp. v. IU Intern. Corp.*[59] rejected my view that § 113(f)(1) permits claims for contribution in the absence of a federal civil action under § 106 or § 107(a); *but* it also rejected the majority's view that the "during or following" language "precludes any claim sounding in contribution except when brought by a party defending against or found liable in a [§ 106] or [§ 107(a)] action."[60] In *Rockwell*, the plaintiff sought a declaratory judgment under § 113(f)(1) in the event that it was later held liable for "whatever costs it may incur in the future as a result of the actual or threatened release of hazardous substances[.]"[61] The district court in Illinois permitted the plaintiff's § 113(f)(1) declaratory judgment action to proceed on the theory that the "during or following" language does not limit the right to seek contribution but merely "recogni[zes] that the actual payment of damages cannot occur until [the plaintiff is found liable]."[62] *Rockwell*, then, does not answer, one way or the other, the core question of this appeal: whether a party that has already incurred cleanup costs and conceded to being a PRP can seek contribution from another putative PRP under § 113(f)(1) in the absence of an ongoing or adjudged § 106 or § 107(a) action against it.

The majority finally turns to this court's own precedent and strains mightily to glean from it an "intimat[ion] that a § 106 or § 107(a) action must be pending or adjudicated for a party to pursue contribution costs" from

---

59 702 F. Supp. 1384 (N.D. Ill. 1988).

60 *See id.* at 1389.

61 *Id.* at 1386.

62 *Id.* at 1389.

dicta in our *OHM* opinion.[63] Reminiscent of the Emperor's new clothes, however, that opinion suggests no such thing. Directly to the contrary, in fact, what we actually observed in *OHM* is that § 113(f)(1) "allows parties to bring contribution actions *at least as soon* as they are sued under CERCLA."[64] Thus *OHM* recognized the distinct possibility — not before us in that case — that contribution could be sought even earlier than the day on which a § 113(f)(1) action is filed. Try as I might, I simply cannot see how the majority can read the phrase "at least as soon as" to indicate anything other than a recognition of the distinct possibility that a § 113(f)(1) action might be brought even earlier than the filing of a civil action under § 106 or § 107(a).

Neither does our discussion of the common-law principle of contribution in *OHM* "imply" that a party must be alleged or held to be liable before it may seek contribution under § 113(f)(1). In *OHM*, we observed that the term "contribution" refers to "an action by a [PRP] to recover from another [PRP] that portion of its costs that are in excess of its pro rata share of the aggregate response costs[.]"[65] This definition comports with the authoritative view that the right to sue for contribution "arises when a party has paid the whole of the obligation or more than his share thereof[.]"[66]

---

63 *See OHM*, 116 F.3d 1574.

64 *See id.* at 1582 (emphasis added).

65 *Id.* (internal quotation marks and citation omitted)

66 *See* 18 Am. Jur. 2d *Contribution* at § 9. *See also McLochlin v. Miller*, 139 Ind. App. 443, 217 N.E.2d 50, 53 (1966) ("It is true that payment must be made under compulsion to entitle payor to contribution. But such pressure exists sufficiently to establish the right to contribution whenever there is a legal obligation to pay. The claimant is not obliged to wait until suit is brought to claim compulsion.").

Contrary to the majority's contentions, the definition of "contribution" adopted by *OHM* and set forth in Black's Law Dictionary — the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear"[67] — does not require that a party either be *alleged* to be or *held* to be liable before it may seek contribution; only that it in fact *be* liable, *i.e.*, "bound or obliged in law or equity."[68] The majority only compounds its error by misconstruing the example of "contribution" provided by Black's Law Dictionary — "Under [the] principle of 'contribution,' a tort-feasor *against whom a judgment is rendered* is entitled to recover proportional shares of judgment from other tort-feasors"[69] — as an exclusive, rather than merely illustrative, application of the principle.

In short, the majority's claim of widespread jurisprudential support for its textual analysis vanishes like the mist when exposed to the sunshine of objective scrutiny. If one robin does not make a spring, then surely a light dusting of equivocal district court cases and a wisp of dicta from another circuit does not persuasive authority make. The paucity of case law — particularly federal appellate case law — directly on point mandates a holding that the plain language of § 113(f)(1) expressly permits an action for contribution to be brought "in the absence of a civil action" under § 106 or § 107(a).

---

67 Black's Law Dictionary at 328.

68 *See id.* at 915.

69 *Id.* (emphasis added).

IV. POLICY

The majority mouths adherence to the prudential rule that when the meaning of statutory language is clear, courts "need not determine which way . . . various policy arguments cut."[70] Nevertheless, the same majority goes on to claim, astonishingly, that its interpretation of the statute furthers rather than frustrates the policy goals of CERCLA that this court has identified as "facilitat[ing] the *prompt* cleanup of hazardous waste sites and . . . shift[ing] the cost of environmental response from the taxpayers to the parties who benefitted from the wastes that caused the harm."[71] The majority weakly contends that it "seems unlikely that Congress enacted a contribution right broad enough to encompass . . . the situation[] where neither the federal government nor any private party has filed a CERCLA action . . . and the EPA has not designated [the facilities] as contaminated sites." But such "logic" is exposed as flawed by the undeniable recognition that the overarching goal of CERCLA is to create strong incentives for responsible parties to perform cleanups of sites without waiting for the hammer of litigation to drop. In my view, the majority's decision runs directly counter to CERCLA's goal of prompt cleanups. In reality, it *encourages* PRPs to postpone, defer, or delay remediation and to "lie behind the log" until forced to incur cleanup costs by governmental order, either administrative or court.

Irrespective of the policy arguments, though, if the text of § 113(f)(1), legitimately read, limited the right to seek

---

70 *See Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. ___ , 121 S. Ct. 1835, 1843 (2001).

71 *See OHM*, 116 F.3d at 1578 (emphasis added).

contribution to those PRPs against which pending or adjudged § 106 or § 107(a) actions were extant, I would be the first to acknowledge and enforce that limitation. As I am convinced, however, that the plain language of the statute creates no such limitation but, to the contrary, expressly permits an action for contribution to be brought "in the absence of a civil action" under § 106 or § 107(a), I must respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AVIALL SERVICES, INCORPORATED,	)	
Plaintiff-counterdefendant,	)	Civil Action No. 3:97-CV-1926-D
v.	)	
COOPER INDUSTRIES, INC.,	)	
Defendant-counterplaintiff.	)	

MEMORANDUM OPINION
AND ORDER

Plaintiff-counterdefendant Aviall Services, Inc. ("Aviall") purchased the aircraft engine maintenance business of defendant-counterplaintiff Cooper Industries, Inc. ("Cooper") and now seeks to recover from Cooper for environmental cleanup expenditures that Aviall undertook voluntarily at four sites acquired pursuant to the asset purchase agreement. Aviall sues primarily on state-law contract and statutory theories, but also seeks relief based on § 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9613(f)(1), the CERCLA contribution provision. Aviall also requests a declaratory judgment under 28 U.S.C. § 2201, the federal Declaratory Judgment Act. The court holds that § 113(f)(1) relief is unavailable where, as here, Aviall is not the subject of a prior or pending CERCLA enforcement action, and dismisses the claim without prejudice. The court holds that 28 U.S.C. § 2201 is not an independent grant of federal question jurisdiction. Having dismissed Aviall's

federal claim, and absent diversity jurisdiction, the court declines in its discretion to exercise supplemental jurisdiction over Aviall's state-law claims, which clearly predominate in this case and are within the expertise of Texas courts, and dismisses the claims without prejudice to their being prosecuted in state court.

I

In 1981 Cooper sold its aircraft engine maintenance business to Aviall pursuant to an asset purchase agreement.[1] Several years later, Aviall discovered extensive contamination of the soil and groundwater at the facilities it had acquired. It voluntarily performed certain cleanup operations. Aviall sues Cooper to recover the costs it has already incurred and those that it anticipates incurring in the future. Aviall seeks relief based on theories of (1) breach of contract, (2) breach of express warranty, (3) contractual indemnification, (4) declaratory judgment, (5) contribution under CERCLA § 113(f)(1), (6) contribution under § 361.344(a) of the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. § 361.344(a) (West 1992 & Supp. 2000), (7) contribution under § 26.3513(j) of the Texas Water Code, Tex. Water Code Ann. § 26.3513(j) (West 1998 & Supp. 2000), (8) quantum meruit, and (9) attorney's fees. Cooper counterclaims for contribution under CERCLA § 113(f)(1) and for contractual indemnification and breach of contract under Texas state law.

Aviall now moves for partial summary judgment and Cooper moves for summary judgment. Although their

---

[1] In 1982 they executed an agreement and mutual release that made purchase price adjustments and settled various ongoing disputes that had arisen subsequent to the asset purchase agreement.

motions do not mirror each other in all respects, both parties seek summary judgment concerning Aviall's claim for contribution under CERCLA § 113(f)(1). The court heard oral argument on January 5, 2000 and now enters this decision.

II

Aviall characterizes this lawsuit as "primarily, but not exclusively, a contract case." P. Apr. 16, 1999 Mem. at 1. In the alternative to its breach of contract claims, Aviall seeks contribution under CERCLA § 113(f)(1). *See id.* at 34.

A

Congress enacted CERCLA in 1980 and in 1986 amended it by the Superfund Amendments and Reauthorization Act ("SARA"). *OHM Remediation Servs. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574, 1578 (5th Cir. 1997). CERCLA's goal is to facilitate the cleanup of hazardous waste sites and to shift the cost of environmental response from taxpayers to the parties responsible for the pollution. *Id.*

CERCLA § 107(a) outlines liability under the statute for four classes of "covered" persons: (1) current owners and operators of vessels or facilities, (2) past owners or operators of any facility at which hazardous substances were disposed of, (3) persons who by contract or agreement arranged for disposal or transport of hazardous substances, and (4) persons who accept or accepted any hazardous substance for transport to disposal or treatment facilities. Parties possibly liable as "covered" persons under § 107(a) are commonly referred to as potentially responsible parties ("PRPs"). CERCLA § 107(a)(4) creates liability when there is a hazardous substance release or potential release that results in

incurring response costs. Section 107(a)(4) provides that "covered" persons

> shall be liable for—(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and] (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan[.]

The 1986 SARA amendments created an express provision for contribution by adding CERCLA § 113(f)(1), which provides:

> Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)], during or following any civil action under [§ 106] or under [§ 107(a)]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] or [§ 107].

B

Aviall asserted in its original complaint separate causes of action under CERCLA §§ 107(a) and 113(f)(1). In

its second amended complaint, Aviall has dropped the independent § 107(a) claim and instead asserts a so-called "combined" § 107(a) and § 113(f)(1) claim.[2] Aviall does not maintain that there is a prior or pending CERCLA enforcement action against it, and Cooper denies liability under § 107(a). Aviall nevertheless seeks contribution from Cooper pursuant to § 113(f)(1).

CERCLA § 107(a)(4)(B) imposes liability on "covered" persons for "any other necessary costs of response incurred by any other person consistent with the national contingency plan[.]" Section 113(f)(1) creates a mechanism for applying the broad liability provision of § 107(a)(4)(B). 107(a)]." The plain language of § 113(f)(1) provides that contribution claims may only be brought "*during* or *following* any civil action under [§ 106] or under [§ 107(a)]." (emphasis added).

The last sentence of § 113(f)(1), which provides that "nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] or [§ 107]," does not command a different result. This proviso is likely intended to ensure that parties who cannot fulfill the prerequisites of § 113(f)(1) are not precluded from bringing contribution claims that are otherwise available, such as under state law. *See Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384, 1389 (N.D. Ill. 1988) ("[W]e view the last sentence of [§ 113(f)] not as derogating from the requirement that a finding of liability precede any award in contribution but as an assurance that

---

[2] In response to questioning during oral argument, Aviall explained that the § 107 component of the combined claim is asserted "as an element of the contribution cause of action under 113[.]" In other words, Aviall relies on § 107 to the extent necessary to maintain a viable § 113(f)(1) contribution claim, not as an independent cause of action against Cooper.

contribution remains available in other contexts, such as through Rockwell's claims for contribution under Illinois law."); *accord Estes v. Scotsman Group, Inc.*, 16 F. Supp. 2d 983, 989-90 (C.D. Ill. 1998) (quoting *Rockwell Int'l Corp.*, 702 F. Supp. at 1389).

In *Estes* the plaintiff acquired a contaminated industrial site and undertook remedial activities both on its own and at the direction of the Illinois Department of Environmental Protection. *Estes*, 16 F. Supp. 2d at 985. The plaintiff later sought to recover response costs from the defendant (the previous landowner) by bringing CERCLA cost recovery actions under §§ 107(a) and 113(f). *Id.* at 986. Both parties were designated PRPs for the site. *Id.* at 987. The district court granted summary judgment on both claims, concluding that the plaintiff could neither maintain the § 107(a) action, because it was a PRP itself, nor maintain a § 113(f) action, because there was no prior or pending § 106 or § 107 action. *Id.* at 987.

Likewise, in *Ameritrust Co. Nat'l Ass'n v. Lamson & Sessions Co.*, 1992 WL 738774 (N.D. Ohio May 21, 1992), a plaintiff voluntarily undertook remedial actions at a site it had purchased. It then sought to recover response costs from the defendant, a prior landowner, pursuant to CERCLA §§ 107(a) and 113(f). *Id.* at *2. On defendant's motion to dismiss, the court upheld the plaintiff's § 107(a) claim but dismissed the § 113(f) claim. *Id.* at *2-*3. The court held that where the "[plaintiff] does not, and cannot, point to a third party that has threatened it with potential liability. . . [plaintiff's] invocation of the CERCLA provisions that allow a defendant to seek contribution is inapposite." *Id.* at *3.

The holdings in *Estes* and *Ameritrust Co.* are consistent with the Fifth Circuit's decision in *OHM Remediation Services*, which, in relevant part, affirmed a

district court's reasoning that dismissal of plaintiff's § 107(a) claim voided its derivative § 113(f) contribution action. *OHM Remediation Servs.*, 116 F.3d at 1580. In discussing the scope of § 113(f) contribution, the panel stated that "contribution" is to retain its customary usage within the context of CERCLA. *See id.* at 1582 ("We agree that 'contribution,' as that word is used in CERCLA, is best understood in its customary sense as a term of art referring to actions brought among potentially responsible parties."). The court relied on the Black's Law Dictionary definition of contribution:

> Right of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear. Under principle of "contribution," a tort-feasor against whom a [judgment] is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff.

Id. (quoting BLACK'S LAW DICTIONARY 328 (6th ed. 1990)). It held that "section 113(f) contribution actions may only be brought by persons who are liable or potentially liable under CERCLA." *Id.* The panel then addressed the timing of § 113(f)'s trigger, stating "[t]his interpretation of potential liability under section 113 allows parties to bring contribution actions at least as soon as they are sued under CERCLA." *Id.* at 1582 (footnote omitted). The court did not, however, reach the issue of pre-enforcement cleanup.

In its brief and at oral argument, Aviall cited *Centerior Service Co. v. ACME Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998), and *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997), to support its

position that it has a viable § 113(f)(1) contribution claim. *Centerior* and *Sun Co.* are inapposite, however, because in both cases, Environmental Protection Agency ("EPA") enforcement actions pursuant to § 106 preceded the contribution claims. *See Centerior*, 153 F.3d at 346; *Sun Co.*, 124 F.3d at 1189. Neither case focused on the viability of a pre-enforcement contribution claim. *Sun Co.* dealt with the proper statute of limitations to be applied to a CERCLA post-enforcement contribution claim and *Centerior* addressed whether joint and several cost recovery, or contribution alone, was available between PRPs.

Similarly, *Cooper Industries, Inc. v. Agway, Inc.*, 1996 WL 550128 (N.D.N.Y. Sept. 23, 1996), which Aviall cites, is also inapposite. *Cooper Industries* dealt *inter alia* with whether a PRP could assert a claim under § 107(a) against other PRPs. *Id.* at *4. On defendant's motion to dismiss for failure to state a cause of action, the court upheld the plaintiffs' claims based on a liberal reading of the complaint, which mentioned both § 107(a) and § 113(f). *Id.* at *5-*6. The EPA had issued a number of administrative orders on consent that directed the cleanup of the contaminated sites. *Id.* at *1. Therefore, cleanup in that case occurred within the procedural framework of CERCLA, and the court did not address whether pre-enforcement cleanup is covered by § 113(f).

The court holds that Aviall's contribution claim is analogous to those asserted in *Estes* and *Ameritrust Co.* Where, as here, a plaintiff in a CERCLA contribution action cannot allege any prior or pending CERCLA enforcement action against it, the plaintiff is precluded from seeking contribution pursuant to § 113(f)(1).[3] Therefore, the court

---

[3] Because Aviall does not assert an independent claim for recovery under § 107(a), the court need not decide whether Aviall, as a PRP, is precluded from maintaining such a claim against Cooper.

grants Cooper's summary judgment motion as it pertains to Aviall's CERCLA § 113(f)(1) contribution claim and dismisses that claim without prejudice.[4]

III

A

Having dismissed Aviall's contribution claim, the court next addresses whether it must or should retain jurisdiction over the balance of the case.

The parties conceded at oral argument that they are not diverse citizens. This court's jurisdiction is thus derived from the now-dismissed CERCLA federal question claim. The federal Declaratory Judgment Act does not confer subject matter jurisdiction on this court. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). Even if it did, the Act is "an authorization, not a command." *Public Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111, 112 (1962). Hence, federal district courts have broad discretion to grant or refuse declaratory relief. *See Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494 (1942) (district court under no compulsion to exercise jurisdiction under the Declaratory Judgments Act); *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80, 84 (5th Cir. 1997); *Torch, Inc. v. LeBlanc*, 947 F.2d 193, 194 (5th Cir. 1991).[5] The court holds that the sole

[4] Although this is a disposition on the merits, which would normally result in dismissal *with* prejudice, the court is dismissing the claim *without* prejudice because Aviall arguably can bring such a claim against Cooper in the future if Aviall becomes subject to a CERCLA enforcement action that gives rise to a right of contribution.

[5] In its second amended complaint, Aviall includes in its declaratory judgment claim a reference to 42 U.S.C. § 9613. It is clear from this pleading, and from Aviall's responses at oral argument, however, that this claim is not an independent federal question declaratory judgment cause of action. CERCLA § 113(g)(2) provides for declaratory relief allocating liability in initial cost recovery actions under § 107 and, as the court has noted above, Aviall does not assert an independent § 107 claim.

federal question claim has dropped out of the case and that only state-law claims remain.[6]

B

The court recognizes that it may retain Aviall's state-law claims under the doctrine of supplemental jurisdiction, but it declines in its discretion to do so. *See* 28 U.S.C. § 1367(c)(3) (court may decline to exercise supplemental jurisdiction where it has dismissed all claims over which it has original jurisdiction). "[W]hen all federal claims are dismissed or otherwise eliminated from a case prior to trial, [the Fifth Circuit has] stated that [its] 'general rule' is to decline to exercise jurisdiction over the pendent state law claims." *McClelland v. Gronwaldt*, 155 F. 3d 507, 519 (5th Cir. 1998) (citing *Wong v. Stripling*, 881 F.2d 200, 204 (5th Cir. 1989)). In the present case, the court sees no reason to vary from the general rule.

First, as the court has noted, Aviall characterizes this lawsuit as "primarily, but not exclusively, a contract case." P. Apr. 16, 1999 Mem. at 1. Aviall also seeks relief under the Texas Solid Waste Disposal Act and the Texas Water Code, statutes that have, so far as relevant to this case, received scant attention from Texas courts, and about which this federal court would be venturing *Erie*-type guesses.[7] Aviall's state-law contract and statutory claims are thus best

[6] That Cooper counterclaims under § 113(f)(1) does not change this conclusion. Federal question jurisdiction is determined by examining Aviall's well-pleaded complaint.

[7] Such guesses would not, of course, be *Erie*-type in the archetypal sense because this court's jurisdiction is not based on diversity of citizenship.

addressed by, and the law developed in, state courts. Second, during oral argument, in response to specific questioning by the court, neither side even intimated that one or both parties would suffer prejudice by now litigating the remaining state-law claims in a Texas tribunal following dismissal of the federal lawsuit.

* * *

The court grants Cooper's motion for summary judgment to the extent of dismissing Aviail's § 113(f)(1) contribution claim without prejudice. The court dismisses Aviall's remaining causes of action, and Cooper's counterclaim, without prejudice.

SO ORDERED.

January 13, 2000.

/s/
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE